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Opinion of the Fourth Circuit Dated July 30, 1970

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 13,746

THE BLACK HAWK CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

(Argued May 5, 1970—Decided July 27, 1970.)

Before BOREMAN, BRYAN and WINTER, Circuit Judges.

W. S. Blakeney (Blakeney, Alexander & Machen on brief) for Petitioner; Robert E. Williams, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallett-Prevost, Assistant General Counsel, and William F. Wachter, Attorney, National Labor Relations Board, on brief) for Respondent, and Cornelius J. Collins, Jr. (Patricia E. Eames, General Counsel, Industrial Union

Department, AFL-CIO, and Textile Workers Union of America, AFL-CIO, on brief) for Intervenors.

Albert V. Bryan, Circuit Judge:

Here in question is the National Labor Relations Board's finding that Black Hawk Corporation violated Sections 8(a)(3) and (a)(1) of the Labor Relations Act, 29 USC 158(a)(3) and (a)(1), by the 1967 layoff of 17 employees. Specifically, the Board found they were thus penalized because of their union leanings and in order to affect the outcome of a pending representation election. The decision is attacked by the Company as lacking in substantial proof. We agree with this contention and decline to enforce that part of the Board's order.[1] This disposition renders moot the plaint of leniency in the remedy suggested by the intervening unions, the Industrial Union Department, AFL-CIO and the Textile Workers Union of America, AFL-CIO.

The Black Hawk Corporation, located in Greenville, South Carolina, is a wholly-owned subsidiary of J. P. Stevens & Co., Inc. It was established in 1960 as a warehouse for the storage and handling of baled cotton to be used exclusively by Stevens' twenty-one consuming plants in North and South Carolina, Georgia, and Tennessee. While Stevens uses some independently owned warehouse facilities, it is uncontested that throughout the middle of

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(Deleted by court order 9/10/70)

1. That part of the Board's order dealing with the direction of a new election, due to Black Hawk's refusal to divulge its employees' names and addresses to the Union is enforced. By its failure to contest this finding, Black Hawk acknowledges dereliction of the duty required of it under *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). See *NLRB* v. *Wyman-Gordon Co.*, 394 US 759 (1969).

1967, Black Hawk, as Stevens' only central cotton storage [illegible], processed the bulk of Stevens' cotton. The operation consists of weighing the raw material on arrival, and testing and classifying it before consolidation into large lots suitable for shipment to the consuming plants.

While the warehouse supply remains fairly constant, the inbound shipments vary during the cotton year. Beginning in late August, volume increases, with the acme in December and January. Ordinarily, there is a slack period from April or May until early August. This fluctuation has caused Black Hawk periodically and correspondingly to adjust the number of its employees. Since 1964, when the warehouse was enlarged, Black Hawk has had as many as 71 people working there during the heavy season. For the three years prior to 1967, the force was reduced for want of work at an average rate of 25 employees annually.

In 1967 there was a steep decrease from 51 to 31 workers in the warehouse, where employees were inclined to unionization, and an increase of four workers in the shop, where a converse sympathy prevailed. These variations occurred during the nine weeks beginning with the charging union's petition for an election on August 22 and ending with the balloting on October 25. The precipitateness of the diminution and its timing occasioned the complaint. Noteworthy here, however, terminations were assigned in inverse seniority order, without reference to activity or disinterest in the organization drive.

Opposing the charge, Black Hawk pleaded economic justification. Cotton is purchased on the open market, and in anticipation of a "short crop" and in the face of new Government production controls, Stevens bought unusually high amounts in late 1966 and early 1967, long before it knew of the Black Hawk union movement which began in June 1967. As a result, in 1967 the usual April-May slow season did not arrive until September. By that time, Black

Hawk argues, independent warehouses which Stevens rented in Gulfport and Clarksdale, Mississippi had accumulated cotton sufficient for consolidation into lots large enough for direct consignment to Stevens' manufacturing plants. Hence, Black Hawk maintains, shipment to it would have been both unnecessary and uneconomical.

The Board rejected this contention, saying that while Stevens had previously used the Gulfport and Clarksdale facilities, nevertheless it had shipped cotton from them through Black Hawk until the fall of 1967. The Board found this rescheduling of an "established practice, whether it had been an uneconomical one or not," to constitute a component of the motive requisite to an 8(a)(3) violation. Other ingredients included Stevens' history of union hostility,[2] its discovery of the currency of the movement, and the hiring of shop employees, thought to be aligned with the Company, when the warehouse workers were discharged.

Decision of the controversy then comes to the ascertainment of whether the proof measures up to the substantiality required to enforce a Board finding and order. In assaying the evidence, we are mindful that the Board's choice between two fairly conflicting views may not be displaced. *Universal Camera Corp.* v. *NLRB*, 340 US 474, 488 (1951). However, we are not mindless that our duty also is to gauge the evidence "in the light that the record in its entirety furnishes, including the body of evidence

2. Stevens has been extensively involved in litigating unfair labor practice charges. Five orders of the Board have been enforced in whole or in part against it since 1967. *J. P. Stevens & Co.* v. *NLRB*, 380 F2d 292 (2 Cir.), cert. denied 389 US 1005 (1967); *Textile Workers Union* v. *NLRB*, 388 F2d 896 (2 Cir. 1967), cert. denied sub. nom. *J. P. Stevens & Co.* v. *NLRB*, 393 US 836 (1968); *J. P. Stevens & Co.* v. *NLRB*, 406 F2d 1017 (4 Cir. 1968); *J. P. Stevens & Co.* v. *NLRB*, 417 F2d 533 (5 Cir. 1969).

opposed to the Board's view." Id. In this, the test is whether

> "the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not * * * be deemed to be supported by 'substantial' evidence." NLRB v. Pittsburgh S.S. Co., 340 US 498, 502 (1951).

Thus, critical to decision here are the inferences which the Board drew respecting Black Hawk's motive in the layoffs. Under 8(a)(3), "both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required." *NLRB* v. *Brown*, 380 US 278, 286 (1965).

The evidential features underpropping the Board's conclusion, make out a prima facie transgression of the Act. Black Hawk countered, however, with proof establishing that it was "motivated by legitimate objectives." *NLRB* v. *Great Dane Trailers, Inc.*, 388 US 26, 34 (1967).

We think the Company sustained its plea, to repeat: that the change of practice—using direct shipments from the outlying warehouses to Stevens' manufacturing plants —was pursued because these warehouses by August, 1967, in the judgment of the company, had accumulated requisite quantities of cotton to render baling and grading operations feasible at the removed points; that incurrence of extra expense by shipping through Black Hawk was thereby obviated; and that the call for men at that warehouse declined.

The new shipping design certainly deserves an inference of fair dealing with labor as much as it does a sinister implication. Moreover, weight should be accorded the judgment of the Company, certainly ex facie presumed bona fide. Whether or not the rearrangement was war-

ranted was a matter of the internal economy of the business, to be resolved by the Company. See *J. A. Hackney & Sons, Inc.* v. *NLRB*, —— F2d —— (4 Cir. May 20, 1970). We do not think that inferences of unfairly motivated or invidious employee-discrimination are permissible because of the change in shipping practices.

Nor may such inferences be drawn in the instant situation from Stevens' history of union bias and knowledge of a current union campaign. These factors have been declared by this court in a corresponding situation to be "diminished to the point that [they] cannot be reasonably deemed to be 'substantial' in the *Universal Camera Corp.* sense." *Maphis Chapman Corp.* v. *NLRB*, 368 F2d 298, 304 (4 Cir. 1966). There, the company was charged with an 8(a)(3) violation for releasing two employees, whom it knew were involved in the union campaign. The employer's general animosity towards unionization was beyond question. Nevertheless, the company was absolved of wrongdoing for one of the discharges, because the evidence over-balanced the possibility that the layoff was with a discriminating purpose—the worker was a seasonal, rather than permanent employee. A similar conclusion must be reached instantly.

The Board's last ground for the finding of improper motive in the shipping changes was the hiring of the additional shop personnel. This, we think, is too slight to provide any sign of ill will. Nothing in the record negates the Company's explanation for these hirings—that the amount of work in the shop necessitated the recruits.

In sum, the Board has failed to carry its obligation of proving that Black Hawk was prompted by a discriminatory purpose in discharging the 17 employees. Black Hawk's justifiable explanation for its conduct stands unrefuted, minifying the effect of the inferences the Board drew from its evidence on motive. The charge of an 8(a)(3) and its attendant 8(a)(1) violation cannot stand.

Enforcement granted in part and denied in part.

WINTER, Circuit Judge, dissenting:

After reciting the established rule that the Board's choice between two fairly conflicting views may not be displaced, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951), and after concluding that the evidence prima facie supports the Board's conclusion that Black Hawk discriminatorily discharged 17 employees in violation of §§8(a)(3) and 8(a)(1), the majority, nevertheless, declines to enforce the Board's order in part. I read the majority's conclusion to rest in its appraisal that Black Hawk's evidence of non-discriminatory motive so overbore the Board's prima facie case that the latter is rendered without substantial support. I disagree.

Admittedly, there was a marked change in shipping pattern, with the result that the services of 17 warehouse employees at Black Hawk were allegedly no longer required. The question is what motivated the change. Was it knowledge of impending unionization of warehouse employees on the part of one of the most anti-union employers in current judicial decisions and an intention to stifle the union? Or was it, as Black Hawk contends and the majority accepts, the legitimate business reason that Stevens had concentrations of cotton in warehouses other than Black Hawk sufficient to make possible grading in the other warehouses and shipment from them to points of manufacture, at greater economy, without resource to Black Hawk? For me, there is in this record ample evidence to support the finding that the former is what occurred.

The Board well summarized the basis for its conclusion that Black Hawk violated §§8(a)(3) and 8(a)(1) in the following portion of its opinion:

> Respondent does not deny the unusual amount of cotton shipped directly from its outlying warehouses in the months surrounding the election, while activity

at Black Hawk was low. We do not find its explanation for this change in method of operation a plausible one. Granted, the cotton had been consigned to those warehouses after Black Hawk had been filled quite high. However, it was not the placing of the cotton in those warehouses for storage that we find significant, it was rather that Respondent began shipping to its manufacturing plants directly from those warehouses, whereas in the past, when necessary to use outlying warehouses, the cotton was nevertheless shipped through Black Hawk and out to its plants. This practice was changed without plausible explanation at a time critical to the Union's campaign, in close proximity to the election, and as found by the Trial Examiner, at considerable cost to Respondent. Black Hawk had already passed its usual "low" season, and although as pointed out above the usual slack never came in 1967, Respondent had experienced some slack and had already lost or laid off some 11 employees before those here involved were let go.

Despite Respondent's attempts to justify its direct shipments through arguments of economy, the fact remains that it changed an established practice, whether it had been an uneconomical one or not, thereby causing a layoff of 17 employees out of the approximately 50 on its payroll. We do not think a result different from the Trial Examiner's is called for because Respondent laid off its employees in strict keeping with length of service, and in the absence of a showing that any of those chosen were more active supporters of the Union than those retained. The layoffs were from the warehouse, where admittedly the Union's strength lay, at a time when Black Hawk would have remained busy if Respond-

ent had continued its practice of prior years. We find that the layoffs were designed to dissipate the Union's strength, and were made because the employees had demonstrated their support of the Union.

A close reading of the foregoing discloses the key to the finding was the lack of plausible explanation for the change in practice. There was ample basis for a finding of lack of plausibility.

Initially, Black Hawk sought to explain the reduction in the warehouse force as one which would normally occur during the summer months, except that in 1967 they occurred later in the year. The record established, however, that reductions in work force in the past had occurred during the summer only because Stevens normally did not have cotton on hand for shipment during that season of the year. For 1967 Stevens' records showed that it had cotton available for shipment in the autumn of 1967 and was shipping cotton in record quantity into outlying independently owned warehouses in spite of the fact that the 1967 cotton harvest began late, and Stevens purchased less cotton than usual because of surplus purchasing in the preceding year.

Stevens then attempted to show that it had used one of the independent warehouses—Gulfport—to assure space and that it had committed itself to give cotton to Gulfport during the 1967-1968 season. That this explanation was specious was shown by records that only 5 carloads of cotton were shipped into Gulfport in the 1966-1967 season, and only 46 carloads in the six months before that, while 198 carloads of cotton were shipped to Gulfport in a mere two-month period in the early fall of 1967. Shipments on the latter scale would hardly have been made if Stevens' real reason for using Gulfport in the fall of 1967 had been to assure future availability of space there in accordance with past needs.

The explanation for the switch in the autumn of 1967 to the practice of shipping cotton directly from outlying warehouses to the consuming plants without passing through Black Hawk was no more satisfactory than the previous attempts to explain what had happened. Initially, Controller Woodside testified that there was no appreciable increase in direct shipments to the plants in the period beginning in August, 1967; but when general counsel proved otherwise, Woodside changed his testimony and admitted that in the first ten months of 1967-1968 season Stevens nearly doubled the volume of its direct shipment, as compared with the entire preceding season. Woodside then sought to explain this increase on the ground that as a result of heavy purchases in the 1966-1967 season, Stevens had on hand an unusual amount of cotton stored in independent warehouses and thus was able to assemble and grade larger quantities of bales of cotton without shipping them through Black Hawk. In this connection, it is claimed that Stevens could save $1.40 per bale—the charge for unloading, handling and reloading cotton at Black Hawk—on all cotton shipped directly.

Even if the estimate of $1.40 per bale cost of handling at Black Hawk is accepted, the explanation overlooks the greater expense involved in storing cotton in independent warehouses for extended periods of time rather than at Black Hawk, a wholly-owned subsidiary, which was established and enlarged for this very purpose, and which had space, during the greater part of the period in question, to accommodate the cotton. Warehouse charges at an independent warehouse range from 40¢ to 50¢ per bale per month, and indirect expenses at Black Hawk continue whether it is used or not. Freight costs for shipping into Black Hawk and then to most of the manufacturing sites are no greater than direct shipment to plants from independent warehouses. The record shows that the majority

of the cotton stored at independent warehouses was stored a sufficient period of time to incur storage charges of $1.40 per bale or greater at a time when space was available at Black Hawk. Black Hawk's argument that it was motivated by economies thus cannot withstand scrutiny. When the insubstantiality of this attempted explanation is coupled with the specious reasons previously advanced, I would conclude that the Board neither decided incorrectly nor that Black Hawk's evidence overbore the permissible inference drawn by the Board. I would enforce the order in its entirety.*

* Since I differ from the majority in its main conclusion, I have no occasion to consider the subsidiary argument, advanced by the union, of whether the Board should have granted more stringent relief.

Order Modifying Opinion of Fourth Circuit

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 13,746

THE BLACK HAWK CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Upon the motion of the National Labor Relations Board, and with the assent of the other parties to this appeal, it is

ORDERED that the footnote No. 1 appearing in the opinion filed July 27, 1970 be, and it is hereby, cancelled and stricken, for the reason stated in the motion—that the Board's order in respect to the election was never before the court for review.

The Clerk is directed to append this order to the original copy of the opinion in his office, and to note on the opinion, opposite the footnote, this order for the delection thereof.

For the Court:

Albert V. Bryan
United States Circuit Judge

A True Copy, Teste:

Samuel W. Phillips, Clerk

By Margaret P. Johnson
Deputy Clerk

NLRB Decision, Order, and Direction

177 NLRB No. 120

D-3129
Greenville, S.C.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11-CA-3488; 11-CA-3499
Case 11-RC-2609

THE BLACK HAWK CORPORATION,
Respondent-Employer,

and

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Charging Party,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO-CLC,
Petitioner.

On December 6, 1968, Trial Examiner Owsley Vose issued his Decision in this proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and supporting arguments, the Charging Party filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

NLRB Decision, Order, and Direction

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and supporting arguments, the General Counsel's brief, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.

Cases 11-CA-3488 & 3499

The complaint in this proceeding alleged, and the Trial Examiner found, that Respondent, a wholly-owned subsidiary of J. P. Stevens & Co., Inc., deliberately changed its method of operation and caused a permanent layoff of 17 employees because of their union sympathies, and in order to affect the results of the election herein involved, thus violating Section 8(a)(3) and (1) of the Act. We agree, with the following modifications.

The workload of the Black Hawk warehouse is determined by the amount of cotton shipped into that warehouse, and thereafter the amount of cotton called for and shipped out to serve the needs of Stevens' manufacturing plants. While consumption by the manufacturing plants fluctuates, the range of fluctuation is not very broad, and the consumption during the times relevant herein in any event was not abnormal. Rather, the General Counsel contends that Respondent deliberately controlled the amount of cotton shipped into Black Hawk, changing its method of prior years, and causing an abnormal lack of work during times critical to the Union's campaign.

The General Counsel has supplied us with voluminous freight bills, shipping orders, and charts summarizing what these documents show. Respondent does not dispute the figures, but only what it is alleged they prove. Respondent also does not dispute the finding that it changed its method of operation, or that the layoffs here involved came at an unusual time of the season. It offers an explanation. Cotton is a commodity on which purchasers bid on the open market, attempting to buy at the best price, and attempting to anticipate both their future needs and the future supply and price of cotton. With the 1966-67 season approaching, in the face of novel governmental production controls, and anticipating a "short crop," Stevens decided to purchase unusual amounts of cotton. Indeed the record shows that purchasing in late 1966 and early 1967 was abnormal, and was also high in relationship to the need for cotton in the immediately coming months. Because of the increased purchasing, Black Hawk did not experience the usual slack season in April, but remained unusually busy until September, when the critical layoffs began. It was at this point that Respondent began to make unusual shipments to its manufacturing plants directly from outlying warehouses.

The Trial Examiner found that the use of the Commodity warehouses in the critical months surrounding the election was unusually high. We do not agree. We are satisfied from a study of the patterns of shipments into and out of Black Hawk as compared to Commodity over a period of 2 years that Respondent did not make unusual use of Commodity in 1967. We therefore do not adopt his findings in this regard.[1] We are satisfied, however, that the pattern of direct shipments from outlying warehouses (that is, those outside the Greenville area) supports the

1. We therefore find it unnecessary to pass on Respondent's claim that a jamming up of cars caused it to use Commodity at the critical time.

General Counsel's case, as the Trial Examiner found. Respondent does not deny the unusual amount of cotton shipped directly from its outlying warehouses in the months surrounding the election, while activity at Black Hawk was low. We do not find its explanation for this change in method of operation a plausible one. Granted, the cotton had been consigned to those warehouses after Black Hawk had been filled quite high. However, it was not the placing of the cotton in those warehouses for storage that we find significant, it was rather that Respondent began shipping to its manufacturing plants directly from those warehouses, whereas in the past, when necessary to use outlying warehouses, the cotton was nevertheless shipped through Black Hawk and out to its plants. This practice was changed without plausible explanation at a time critical to the Union's campaign, in close proximity to the election, and, as found by the Trial Examiner, at considerable cost to Respondent.[2] Black Hawk had already passed its usual "low" season, and although as pointed out above the usual slack never came in 1967, Respondent had experienced some slack and had already lost or laid off some 11 employees before those here involved were let go.

Despite Respondent's attempts to justify its direct shipments through arguments of economy, the fact remains that it changed an established practice, whether it had been an uneconomical one or not, thereby causing a layoff of 17 employees out of the approximately 50 on its payroll. We do not think a result different from the Trial Examiner's is called for because Respondent laid off its employees in strict keeping with length of service, and in the absence of a showing that any of those chosen were more active supporters of the Union than those retained. The layoffs

2. We find merit in Respondent's exception to the Trial Examiner's finding that Respondent in 1966 paid an 8-cent transit charge on 138 carloads of cotton. The figure should be 67. This discrepancy does not alter our finding, however.

were from the warehouse, where admittedly the Union's strength lay, at a time when Black Hawk would have remained busy if Respondent had continued its practice of prior years. We find that the layoffs were designed to dissipate the Union's strength, and were made because the employees had demonstrated their support of the Union. Such a demonstration by Respondent of its control over its employees' destiny when made in the circumstances of this proceeding is violative of Section 8(a)(3) and (1) of the Act. We also find, as did the Trial Examiner, that the three employees laid off shortly after the election were also discriminated against, for if Respondent had not unlawfully diverted shipments from Black Hawk they would not have been laid off. Accordingly, we shall adopt the Trial Examiner's Recommended Order.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, The Black Hawk Corporation, Greenville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

In paragraph 2(a) of the Recommended Order, and in the last indented paragraph of the Notice To All Employees, delete the name "Sammy Patterson" and substitute the name "Sammy Peterson."

Case 11-RC-2609

Pursuant to a Decision and Direction of Election, issued by the Regional Director for Region 11 on September 26,

1967, an election by secret ballot was conducted on October 25, 1967, in the unit found appropriate. After the election, the parties were furnished a tally of ballots which showed that of approximately 49 eligible voters, 63 cast ballots, of which 22 were for, and 24 were against the Petitioner, and 17 ballots were challenged. The challenged ballots were sufficient in number to affect the results of the election. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election. In accordance with National Labor Relations Board Rules and Regulations the Regional Director conducted an investigation of the objections and, on January 31, 1968, issued and duly served upon the parties his Supplemental Decision, Direction, and Order Consolidating Cases.

The Petitioner challenged the ballots of Jackie Delk, James Pruitt, and George Wilson on the ground they were not employed on or before the established eligibility date. The Regional Director overruled these 3 challenges. The Board Agent in charge challenged the ballots of 14 persons alleged by the Petitioner to be eligible employees, but whose names did not appear on the eligibility list. These 14 persons were also alleged to have been discriminatorily laid off in Cases 11-CA-3488 and 3499, above. The Regional Director therefore recommended that the issue of their eligibility be sent to hearing together with those cases. Petitioner's sole objection to the election was that Respondent had refused to furnish it with a list of employees' names and addresses, as required by the rule established in *Excelsior Underwear Inc.*, 156 NLRB 1236, and pursuant to the Regional Director's Decision and Direction of Election. That Respondent so refused was undisputed, and the Regional Director therefore sustained the Petitioner's objection. He recommended that, once the issues with regard to the unresolved challenges were decided by the Board, all ballots as to which challenges were overruled should be

opened and counted, and a revised tally issued. If the revised tally should show that the Petitioner has received a majority of the valid ballots cast, the Petitioner should be certified as exclusive bargaining representative. If it has not received a majority, the election held on October 25, 1967, should be set aside on the basis of the *Excelsior* objection sustained by him, and a new election directed. No one excepted to the Regional Director's findings or recommendations, and they are hereby adopted. In view of our findings in Cases 11-CA-3488 and 3499, above, we also hereby overrule the challenges to the ballots of those 14 employees therein found entitled to reinstatement.

Accordingly, we shall direct that the Regional Director open and count the 17 challenged ballots, and thereafter issue and serve upon the parties a revised tally of ballots, and either certify the Union or hold a new election, whichever is appropriate.

Direction

IT IS HEREBY DIRECTED that the Regional Director for Region 11 open and count the ballots of Jackie Delk, James Pruitt, George Wilson, Joyce Byrd, Agnes Foster, Thomas McMillian, Ollie McAllister, Alvin Kerns, James Smith, Bobby Bowen, James Jones, Sammy Peterson, James Brock, Donald Smith, Thomas Jenkins, Alvin Hunt, and James Arnold, and thereafter prepare and cause to be served upon the parties a revised tally of ballots, including therein the count of the above ballots. If, according to the revised tally of ballots, the Petitioner has received a majority of the valid ballots cast in the election, the Regional Director is directed to certify Textile Workers Union of America, AFL-CIO-CLC, as the exclusive bargaining agent for the employees in the appropriate unit. If, however, according to the revised tally of ballots, the Petitioner has

not received a majority of the valid ballots cast in the election, the following Order and Direction of Second Election shall be applicable.

Order

IT IS HEREBY ORDERED that the election conducted in Case 11-RC-2609, on October 25, 1967, among the employees of The Black Hawk Corporation, at its Black Hawk warehouse, Greenville, South Carolina, be, and it hereby is, set aside.

Direction of Second Election

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director for Region 11 deems appropriate. The Regional Director shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or re-

instated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Textile Workers Union of America, AFL-CIO-CLC.

Dated, Washington, D.C., July 23, 1969.

Frank W. McCulloch
Chairman

John H. Fanning
Member

Gerald A. Brown
Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

3. In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 89 S.Ct. 1426 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Trial Examiner's Decision

TXD-717-68
Greenville, S.C.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D.C.

Cases No. 11-CA-3488; 11-CA-3499

THE BLACK HAWK CORPORATION,
Respondent,

and

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Charging Party.

Case No. 11-RC-2609

THE BLACK HAWK CORPORATION,
Employer,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO-CLC,
Petitioner.

JESSE L. BUTLER and HENRY N. PATTERSON, JR.
of Winston-Salem, N.C., for the
General Counsel.

Trial Examiner's Decision

WHITEFORD S. BLAKENEY of Charlotte, N.C.,
for the Respondent.

HAROLD McIVOR and GENE GORE
of Greenville, S.C., for the
Charging Party and the Petitioner.

OWSLEY VOSE, Trial Examiner: A consolidated complaint in Cases 11-CA-3488 and 11-CA-3499 was issued by the General Counsel against the Respondent, The Black Hawk Corporation, on January 31, 1968, pursuant to charges filed by the Charging Party, Industrial Union Department, AFL-CIO, hereinafter called the IUD, on the preceding November 30 and December 14. The consolidated complaint alleged that the Respondent had discharged or laid off 17 of its employees in September, October and November 1967, in violation of Section 8(a)(1) and (3) of the Act. In Case No. 11-RC-2609, a representation case involving the Respondent's employees, the Board agent conducting an election at the Black Hawk warehouse on October 25, 1967, had challenged the ballots cast by 14 of the 17 employees involved in Cases Nos. 11-CA-3488 and 11-CA-3499 on the grounds that the said 14 employees had been separated from Black Hawk's payroll on various dates between September 22 and October 18, 1967. The Regional Director, upon considering the challenged ballots, concluded that they raised questions the resolution of which required a hearing before a Trial Examiner and accordingly directed that such a hearing be consolidated with the hearing on the unfair labor practice allegations in Cases Nos. 11-CA-3488 and 11-CA-3499. Such hearing was held by me on various dates in March, April and June 1968, the last day of hearing being June 26, 1968. All parties were represented at the hearing and participated fully in the proceedings.

At the conclusion of the General Counsel's case, the General Counsel submitted a detailed memorandum discussing the voluminous exhibits introduced by him into evidence, and after the close of the hearing both the General Counsel and the Respondent filed thorough and searching briefs.[1]

Upon the entire record in the case, my consideration of the briefs, and from my observation of the witnesses, I make the following:

Findings and Conclusions

I. The Business of the Respondent and its Role in the Operations of J. P. Stevens & Co., Inc.

The Respondent, a wholly owned subsidiary of J. P. Stevens & Co., Inc. (hereinafter called Stevens), operates a warehouse in Greenville, South Carolina, known as the Black Hawk warehouse, where it handles Stevens cotton exclusively. The movement of the bales of cotton into the warehouse and out to Stevens' plants is controlled exclusively by Stevens. Gordon McCabe, the president of the Respondent, is a vice president of Stevens and is [illegible]pon-

1. After the close of the hearing the Respondent, at my request, submitted an exhibit containing figures as to Stevens' monthly purchases of cotton, its monthly consumption of cotton, and as to the number of bales of cotton on hand at the end of each month. These figures cover the period commencing on August 1, 1965 and continuing through May 1968. This exhibit, which I have marked as Respondent's Exhibit 19, is received in evidence. The General Counsel also submitted two exhibits after the close of the hearing, which he had marked as General Counsel's Exhibits 99 and 100. The former contains United States Department of Agriculture figures covering spot prices for cotton, month by month from August 1964 through April 1966. The latter contains United States Department of Agriculture figures for the estimated percent of cotton production sold each month of the crop marketing year, 1966 and 1967 crops. General Counsel's Exhibits 99 and 100 are received in evidence.

sible for the operation of Stevens' Commodity Division, which handles Stevens' wool and cotton purchasing. Thomas Woodside, secretary and assistant treasurer of the Respondent, is controller of Stevens' Commodity Division.

The great majority of the cotton which Black Hawk handles at its warehouse in Greenville, South Carolina, originates outside of South Carolina, coming from all of the cotton producing states from California to South Carolina. In the year preceding the issuance of the complaint herein, the Respondent received and stored cotton valued substantially in excess of $50,000 and during the same period shipped more than $50,000 worth of cotton to Stevens' plants located outside of South Carolina.

Upon all of the foregoing facts I find that the Respondent is operated as an integral part of Stevens' vast textile enterprise and that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Industrial Union Department, AFL-CIO (herein called the IUD), and Textile Workers Union of America, AFL-CIO-CLC (herein called the Union), are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Terminations in Violation of Section 8(a)(3) and (1) of the Act*

1. The nature of the Respondent's warehouse operation

This case, involving as it does, the termination of 17 warehouse employees, requires a brief statement of the nature of the Respondent's warehouse operations and the

role which it plays in Stevens' textile operations. The Black Hawk warehouse, constructed by Stevens in 1960 and opened for business in 1961, serves as a concentration point for cotton purchased by Stevens for its 21 cotton consuming plants. Stevens requires 27 to 30 different grades of cotton in its operations. Some of this cotton is available only in small lots and comes from numerous different locations in the cotton-growing states of this country. To assemble sufficient cotton of the right grades for the consuming plants requires the consolidation of smaller lots with larger lots. While the Respondent contends that its warehouse is used primarily for the concentration of smaller lots of cotton, records introduced into evidence by the General Counsel establish that in the past larger lots of cotton as well as the smaller lots have been concentrated at the Black Hawk warehouse.

The Black Hawk warehouse takes care of the receiving and weighing of the bales of cotton, the extracting of samples from each bale for testing purposes, the storing of the cotton, and the shipping out of the requested grade of cotton to the consuming plants. The grade of all of Stevens' cotton, including that purchased in large lots, is analyzed and tested in the laboratory of Stevens' Commodity Division at the Duncan Mill near Greenville. This is done by extracting two samples from each side of each bale, either at Black Hawk or at the outside public warehouse, and sending them to Stevens' laboratory.

Thomas Woodside, who, as noted above, is both controller of Stevens' Commodity Division and secretary and assistant treasurer of the Respondent, testified (in June 1968) that "Currently" approximately 50 percent of Stevens' yearly purchases of cotton were being handled at the Black Hawk warehouse. However, in view of Woodside's testimony that a total of 120,000 bales of cotton were shipped from outlying warehouses direct to consuming

plants in the 1966-1967 cotton season[2] and exhibits showing that over 300,000 bales were shipped from Black Hawk to consuming plants during that season, it appears that over 70 percent of Stevens' cotton passed through Black Hawk in the previous cotton season.

Cotton is a seasonal crop and the volume of work in a cotton handling warehouse naturally fluctuates, being at its greatest during the peak of the harvesting of the cotton crop and dwindling thereafter until the new crop starts coming on the market. In a normal year, the new crop starts to move in August and the volume of work in a concentrating warehouse rapidly picks up in September and October, and the volume starts to decline about the first of the new year. The activities in a concentrating warehouse usually start to slack off in late April or May.

As a result of the fluctuations in the volume of cotton moving through the Black Hawk warehouse, the number of employees in the warehouse has varied from season to season. Since 1964, when seven additional compartments were added to the 10 already in place, the number of warehouse employees has fluctuated between 71 and 28, the lowest number being reached after the 1967 terminations, which are involved in this case.

There are two groups of employees in the warehouse, one consisting of those who work in the warehouse proper handling the cotton, and the other consisting of the employees in the shop who repair the machines used in handling the cotton in the warehouse. The former are Negroes and the latter are largely white.

2. Sequence of salient events

The IUD began an organizing campaign among the employees at the Black Hawk warehouse in the latter part of

2. A cotton season runs from August 1 through July 31 of the following year.

June 1967. The IUD succeeded in interesting a number of the Negro warehouse employees in affiliating with it. Only one shop employee took part in union affairs. V. C. Kittles, the general manager of the Respondent, admitted hearing about the union campaign about the first of August. Kittles further admitted hearing that one shop employee had attended union meetings and that "from six or seven, maybe, up to twenty" warehouse employees attended such meetings.

On August 22, 1967, the Union filed a petition with the Board's Regional Director at Winston-Salem for certification as the bargaining representative of all of the Respondent's employees, including shop employees. A hearing on this petition was held on September 15, 1967, and thereafter, on September 26, 1967, the Regional Director issued his Decision and Direction of Election. Under this decision, all warehouse and shop employees who were on the payroll during the payroll period ending September 23, 1967, were eligible to vote.

Commencing on September 21, 1967, the Respondent terminated 20 warehouse employees, including three female employees whom the Respondent characterizes as "temporary sample girls." In each case the Respondent assigned lack of work as the reason for the termination. The instant case involves 17 of these terminated employees, including two of the three sample girls. The three sample girls were the first to be terminated. This occurred on September 21, 1967.[3] On September 22, three men were terminated.[4] Three additional men were let go on Septem-

3. The two sample girls involved in this case are Joyce Byrd and Agnes Foster. Naomi Yurgen, the third sample girl, was not working on September 21, having been out ill for a long time prior to that date.

4. Thomas McMillian, Ollie McAlister and Alvin Kerns.

ber 29.[5] On October 6, three more warehouse employees were terminated.[6] Two men were terminated on October 13, neither one of whom is involved in this case. On October 18, the Respondent terminated Thomas Jenkins, Alvin Hunt and James Arnold.

The election was conducted by the Regional Director on October 25, and resulted in 22 votes being cast for the Union, 24 votes being cast against the Union, with 17 challenged ballots. As indicated above, the challenged ballots included the ballots cast by 14 of the 17 employees here involved.

The remaining three employees involved in this case were terminated after the election, Harry Acker on October 27, Billy Jenkins on November 3, and Walter Knox on November 8.

With the exception of the sample girls, all of the terminations were effected in the inverse order of the employees' seniority, i.e., the last hired were the first to be let go.

3. History of Stevens' opposition to the organization of its employees

The Board in recent years has had a number of occasions to pass upon allegations of unfair labor practices affecting Stevens' employees at various locations, including the location here involved. In Stevens I, 157 NLRB 869, involving findings of various violations during 1963 and 1964, including the unlawful discharge of 71 employees at 20 different locations, including the Black Hawk warehouse, the Board adopted the Trial Examiner's conclusion that

> * * * Respondent, through its plant superintendents, acting in collaboration, initiated and pursued a pattern of conduct the purpose of which was to crush

5. James Smith, Bobby Bowen and James Jones.

6. Sammy Patterson, James Brock and Donald Smith.

> the Union movement. With scant regard for the means employed other than their effectiveness, it interfered with, restrained and coerced its employees in the exercise of their rights under the Act, fragrantly, cynically, and unlawfully (157 NLRB, at 965-966).

The Court of Appeals for the Second Circuit, in enforcing the Board's decision in Stevens I with minor modifications affecting the notice to employees provisions of the Board's remedial order, expressly affirmed the propriety of the above quoted conclusion. *J. P. Stevens & Co. v. N.L.R.B.*, 380 F. 2d 292, 301 (C.A. 2), cert. denied, 389 U.S. 1005.

Stevens II, 163 NLRB No. 24, involves findings of further unfair labor practices in 1964 at eight locations, again including the Black Hawk warehouse. In this case the Board affirmed the Trial Examiner's findings that Stevens had, among other things, unlawfully discriminated against 19 employees. It also concurred in the Trial Examiner's observation, as follows:

> The record of the 1965 hearing reflects the continued, systematic determination of this employer as revealed by the record of the 1964 hearing, to destroy the union root and branch by discharging its most active members on any pretext which might come to hand, or could be invented, by threatening to discharge others unless they came to management and renounced the Union, and by provoking the resignation of still others from Respondent's employment. No other conclusion can be drawn than that Respondent has largely succeeded in its purpose (TXD-700-65, p. 48).

The Court of Appeals for the Second Circuit in enforcing the Board's order in Stevens II with minor modifications affecting the remedy, quoted the above observation with ap-

proval. *Textile Workers Union of America, AFL-CIO* v. *N.L.R.B.*, 388 F. 2d 896, 903, cert. denied, October 14, 1968.

In Stevens III, 167 NLRB No. 37, the Board found, among other unfair labor practices, acts of antiunion discrimination against 19 employees at four plants in 1965. The Board, in granting the Union's request for unusual remedial provisions respecting the notices to be posted because of "the record of extensive and flagrant unfair practices" in Stevens I and Stevens II, quoted with approval the Trial Examiner's observations, as follows:

> * * * I have the inescapable but independently reached conviction, * * * from having heard innumerable witnesses at the trial, and having carefully digested and reviewed their testimony from the typewritten transcript, that many of the witnesses called by Respondent testified as they did pursuant to a policy, made at a higher level of management than theirs, to defeat this Union's organizational effort at the cost, if necessary, to committing unfair labor practices and then denying the unlawful acts in the process * * * (TXD-12-67, p. 4).

Stevens IV, 167 NLRB No. 38, involved 1966 unfair labor practices affecting the jobs of three employees at three different Stevens locations. The Board, finding that the discharge involved in this case reflected a continuation of the pattern of "massive and deliberate" unfair labor practices aimed at stopping the Union's continuing organizational campaign, again granted the Union's request for a sweeping remedial order. Stevens III and IV are pending in the Court of Appeals for the Fourth Circuit upon Stevens' petitions for review.

Stevens V, 171 NLRB No. 163, deals with the unlawful discharge of four employees in 1967 at two additional Stevens plants in Georgia. In view of Stevens' "companywide

history of extensive unfair labor practices" as reflected in Stevens I, Stevens II, Stevens III, and Stevens IV, the Board concluded that "the conventional remedies would not be adequate to disabuse the employees of the effects of the Respondent's flagrant conduct" and again provided for the unusual remedy respecting the mailing and reading of notices to the employees. Stevens V is pending before the Court of Appeals for the Fifth Circuit upon Stevens' petition for review.

4. The General Counsel's contentions regarding the terminations here involved

The General Counsel contends that Stevens' management officials deliberately reduced the volume of cotton moving into the Black Hawk warehouse in the late summer and fall of 1967, after it became aware of the Union's campaign to organize the warehouse employees, in order to have an excuse for laying off employees prior to the election, which was held on October 25, 1967.

In support of this contention the General Counsel relies on the following asserted facts and circumstances:

a. That the 1967 reduction in force among the employees in the warehouse proper was considerably greater in scope than that in past years; that at the same time the Respondent was commencing to reduce the number of warehouse employees, it substantially increased the number of shop employees; and that the Respondent was aware that interest in the Union was confined almost exclusively to the warehouse employees.

b. That Stevens substantially reduced the volume of cotton moving into the Black Hawk warehouse com-

mencing in September 1967, and the following month sharply reduced the volume of cotton shipped from the warehouse to Stevens' consuming plants.

c. That although ample space was available at Black Hawk in September and October 1967, Stevens consigned an extraordinarily high percentage of the cotton shipped to Greenville to an independently owned public warehouse, the Commodity warehouse, rather than to its own Black Hawk warehouse, and actually placed an unusually high percentage of cotton in the Commodity warehouse, considering the low level of activity at Black Hawk.

d. That in the late summer and fall of 1967, Stevens greatly increased the use of outlying public warehouses for the storing and consolidation of its cotton and at the same time sharply increased its direct shipments from such outlying warehouses to its consuming plants.

a. *The unprecedented termination of warehouse employees and the simultaneous hiring of shop employees*

As found above, the seasonal variations in the volume of cotton flowing into the warehouse require changes in the size of the work force. Each year since the completion of the warehouse, Black Hawk has effected a reduction in force among the warehouse employees. However, in none of the previous 6 years has the reduction in force compared in size with that of the one involved in the instant case. In the first 4 years of its operations, the terminations for lack of work averaged a little over 10 a year. In the 2 years preceding the one in question, with the warehouse sub-

stantially increased in size, the number of terminations for lack of work was even less. In 1965, 8 employees were terminated for lack of work, leaving 40 employees remaining at work, and in 1966, only 3 employees were let go and at least 45 warehouse employees were retained throughout the year. In contrast, in 1967, 20 employees were terminated, assertedly for lack of work, leaving only 28 warehouse employees at work.

The 1967 reduction in force, which began on September 21, 1967, occurred after the Black Hawk normal slack season had been passed and at a time when the new crop of cotton normally started to move. Even with a late crop, as the 1967 crop was, Stevens could anticipate that within a month the new crop of cotton would be passing through the warehouse in volume, if operations proceeded as usual in the warehouse. Thus not only was the 1967 reduction in force unprecedented in size, but occurred at an unusual time. And the timing was such that it had the maximum effect on the election, which Stevens had reason to know was imminent, the representation hearing having been held on September 15. In all, the warehouse force was reduced from 50 to 31 between September 15, 1967 and October 25, 1967. Thus, over a third of the warehouse work force was terminated between the date of the representation hearing and the date of the election.

During this same period the Respondent hired four shop employees. At least three of these men were hired prior to September 23, which made them eligible to vote in the election. These three new shop employees were white while the 19 warehouse employees terminated were Negroes.[7] As

7. While the Respondent's records show that 20 warehouse employees were laid off between September 15 and October 25, 1967, this case involves only 14 of these 20, no charge having been filed with respect to the remaining 6. The case also involves three additional employees who were terminated after the election.

found above, the Respondent was aware that the strength of the Union was concentrated among the Negro warehouse employees, and that but one shop employee had shown interest in the Union.

As stated above, the Respondent does not dispute any of the figures above set forth, but seeks to counter the inferences flowing therefrom by pointing to other figures—figures concerning the spread between the highest number of warehouse employees and the lowest number of warehouse employees during the 7 years the warehouse has been in operation. The Respondent argues that percentagewise the cutback in 1965 was 43 percent as compared with 54 percent in 1967. But a glance at the figures upon which the Respondent relies, showing a drop to 28 employees in 1967 as compared with a reduction to 45 in 1966 and 40 in 1965, shows the drastic nature of the 1967 reduction in force. This is only a little more than the number of men Black Hawk kept at work during the slack season in the first 4 years of the warehouse's operation, when the warehouse was only a little over half its present size, 10 compartments or less against its present 17 compartments.

b. *The sharp drop in inbound and outbound shipments of cotton to and from the Black Hawk warehouse in September and October 1967*

Black Hawk does not dispute the figures relied upon by the General Counsel to establish the sharp drop in inbound and outbound shipments to the warehouse in September and October, 1967, the period immediately preceding the election. The extent of the drop can be seen in the following tabulation of the number of carloads of cotton received

and shipped from the Black Hawk warehouse from May 1966 through November 1967.

1966	*Received*	*Shipped*
May	164	—
June	137	99
July	236	136
August	124	250
September	337	231
October	201	208
November	281	392
December	405	283
1967		
January	449	312
February	262	235
March	282	229
April	279	89
May	95	212
June	248	181
July	190	127
August	160	292
September	50	235
October	35	64
November	89	50

The sharp contrast between the 1702 carloads received and shipped in September, October and November 1966 and the 523 carloads received and shipped during September, October and November 1967, can readily be seen. It appears that in this 3-months period, the Respondent was operating at less than one-third of the rate of which it had been operating in the previous year. During this period, as Controller Woodside testified, the number of bales of cotton stored in the warehouse dropped to between 35,000 and

40,000 bales. This is less than half of the warehouse's 90,000 bale capacity.

The Respondent explains the sharp reduction in the use of the Black Hawk warehouse facilities in the fall of 1967 as follows: Stevens had made extraordinarily large purchases of cotton in November and December 1966 in anticipation of a short crop in the following year. Much of this cotton was in large lots rendering it feasible to have the cotton shipped directly from the outlying warehouses to the consuming plants. This is the testimony of Controller Woodside. No figures concerning the size of the various lots of cotton purchased were adduced to bear this testimony out. Nor were any figures adduced to support Woodside's further testimony that the smaller lots were moved promptly into Black Hawk, which resulted in a high level of activity at Black Hawk throughout the normal slack season, but which activity ended in September 1967. Woodside further testified that because of Stevens' exceptionally high volume of purchases in November and December 1966, its purchases of cotton from February through October 1967 were considerably less than normal and this also resulted in a lessening of the activities at Black Hawk. Woodside added also that the movement of the 1967-1968 cotton crop to market was late which also contributed to the decline in activity at Black Hawk in the fall of 1967. Figures furnished by the United States Department of Agriculture show that the 1967-1968 crop moved to market at least a month later than the 1966-1967 crop. Woodside's explanations for the sharp drop in Stevens' use of its Black Hawk warehouse in the fall of 1967 are considered below.

c. *Stevens' consignment of cotton to Commodity at a time when activity in its own Black Hawk warehouse was at a low ebb*

At the same time the Black Hawk warehouse was operating at less than one-third of its previous operating rate, and at a time when it was about half full, Stevens commenced consigning the great bulk of its shipments from outlying areas to the Commodity warehouse in Greenville, a public warehouse having no connection with Black Hawk or Stevens. This was a departure from Stevens' past practice.

Thus in September 1967, Stevens consigned 73 of the 88 cars sent to Greenville for warehousing to the Commodity warehouse. Earlier in 1966 and 1967, almost all the cars placed at the Commodity warehouse had originally been consigned to Black Hawk.[8] However, apparently realizing that it did not make sense to consign cotton to Commodity when it had plenty of space available at Black Hawk and when its own warehouse staff was comparatively idle, Stevens had 37 of the 73 cars originally consigned to Commodity placed at the Black Hawk warehouse. When placement instructions are given before the arrival of the cars in Greenville, the destination of the cars can be changed without extra cost to Stevens.

Even after placing these 37 cars at Black Hawk, the 38 cars which Stevens had Commodity handle in September 1967, was a significantly larger number of cars than Stevens

8. Attached hereto as Appendix B is a chart showing the carloads of cotton shipped to both the Black Hawk and Commodity warehouses in Greenville in the period from May 1966 through February 1968, inclusive, which shows both the original consignments and the ultimate placement of all cars of cotton during this period. The figures on this chart are taken from Appendix B to the brief of the General Counsel. While I have found some slight discrepancies in the numbers of carloads shipped in certain months, I have found none affecting the validity of the inferences to be drawn from these figures.

had previously had Commodity handle, taking into consideration the very low level of activity and large amount of space available at Black Hawk at this time. While Stevens had stored cotton with Commodty for a number of years, the figures on Appendix B show, and I find, contrary to the Respondent's position, that Stevens had utilized Commodity's services previously for the most part at times when Black Hawk was busy with incoming and outgoing shipments and needed relief.

Woodside's testimony concerning the placing of cotton in the Commodity warehouse in essence is as follows: Commodity gives good service and has better platform space than Black Hawk. The governing factor in determining whether to use Commodity is whether there is a "jamming up of boxcars in Greenville" which would result in demurrage charges unless the transfer to Commodity were effected.

Records of the inbound shipments to Black Hawk in September 1967 show that there clearly was no jamming up of inbound cars at any time in the month of September 1967. While outbound shipments were heavy in September, there being 235 cars outbound as compared with 50 inbound, the total of inbound and outbound shipments per day were well below the capacity of the warehouse crew to handle them. Robert Stewart, a leadman in the warehouse, testified without contradiction that "during our busy season we might unload as many as twelve or thirteen [boxcars a day], and ship the same amount or more." On only one day in September, September 22, did the Black Hawk warehouse crew handle a combined total number of inbound and outbound of 22 boxcars, and on most of the remaining days the total number of inbound and outbound cars was considerably less. The maximum number of inbound cars on any one day was nine on September 23, and this occurred on a day when there were no outbound shipments. The

tracks along Black Hawk's 1700-feet long warehouse can accommodate over 30 boxcars, more cars than were being loaded and unloaded on any one day in September 1967. Thus, under the criteria stated by Woodside, there would appear to be little need for Stevens' substantial diversion of cars to Commodity in September 1967.

d. *Stevens' increased use of outlying warehouses as concentration points for its cotton and its increased direct shipment from such warehouses to consuming plants*

The evidence concerning Stevens' increased use of outlying warehouses relates to shipments in and out of Mississippi-Gulfport Compress & Warehouses, Inc., at Gulfport, Mississippi (herein called Gulfport), and also to Stevens' shipments out of the Federal Compress and Warehouse Company at Clarksdale, Mississippi (herein called Clarksdale).

Regarding the latter warehouse, records of outbound shipments from Clarksdale are in evidence covering the period commencing with the month of October 1965 and continuing through the month of March 1968. In the 25-month period ending with the month of October 1967, 131 carloads of cotton were shipped from Clarksdale to Black Hawk, 3 carloads were sent to the Commodity warehouse in Greenville, and only 1 was shipped direct to a consuming plant, the Exposition Plant in Atlanta, Georgia. However, in the 6-month period commencing with November 1967, a total of 176 carloads were shipped from Clarksdale direct to consuming plants and only two carloads were shipped to Black Hawk during this period.

As to Stevens' increased use of Gulfport, the General Counsel introduced into evidence freight waybills and documents covering all of Stevens' inbound and outbound

shipments of cotton to and from Gulfport during the period commencing with January 1966 and continuing through March 1968. These documents show, regarding that portion of the 1965-1966 cotton season for which records are in evidence, that Stevens shipped 46 carloads of California cotton into Gulfport in January and February 1966[9] and none in the rest of the 1965-1966 cotton season. In all of the 1966-1967 cotton season Stevens shipped a total of 5 carloads of cotton into Gulfport, 2 carloads of cotton from Houston, Texas, in December 1966, and 3 carloads from New Mexico and West Texas in January 1967.

These Stevens' shipments into Gulfport at about the end of the years 1965 and 1966 were made at times when Black Hawk was normally quite busy. In 1966, Gulfport's shipments out to Steven's consuming plants all occurred in the months of May through September, several months after the cotton had been received, and during slack periods at Black Hawk.

Viewing the foregoing facts in light of the further fact that Black Hawk does not have sufficient capacity to store large quantities of cotton for indefinite periods, but must have inflow and outflow on a more or less regular basis, it appears that prior to the 1967-1968 cotton season, Stevens has used Gulfport as a concentration point for its cotton during periods of heavy shipments into Black Hawk and has had shipments made from Gulfport to consuming plants months later, during Black Hawk's slack season. Thus, in the past Stevens has used Gulfport as an overflow warehouse to relieve Black Hawk of pressure in busy seasons.

However, in the 1967-1968 cotton season, after the union campaign was under way and Stevens had reason to be aware that an election was imminent, Stevens changed its old procedure and commenced using Gulfport as a substi-

9. Freight waybills in evidence covering outbound shipments of cotton from Gulfport in 1966 indicate that some additional Stevens' cotton was received at Gulfport in December 1966.

tute for Black Hawk. In contrast with the 5 carloads of cotton shipped by Stevens to Gulfport in all of the 1966-67 season, Stevens had a total of 198 cars of cotton shipped from the Lower Gulf Region of Texas in the 2-month period from August 24 to October 24, 1967 alone.

The cotton from the Lower Gulf Region of Texas, which Stevens placed in Gulfport in the late summer and fall of 1967, was cotton which, in the previous cotton season, had been shipped by Stevens to Black Hawk in quantity. The figures are as follows:

Month	Cars
August 1966	12
October	128
September	230

Later on, Stevens also diverted substantial quantities of East Texas cotton from Black Hawk to Gulfport. In December 1967 and January 1968, Stevens shipped a total of 57 carloads of East Texas cotton to Gulfport but shipped none to Black Hawk. In the previous cotton year, taking the months of November and December 1966 for comparison purposes since the 1967 cotton season was late, Stevens shipped a total of 82 carloads of East Texas cotton to Black Hawk.

Controller Woodside explained the greatly expanded use of the Gulfport warehouse in the fall of 1967 as follows: Formerly cotton purchased by Stevens in California and Arizona was placed in Gulfport. However, because the Southern Freight Association had set an 8 cents per hundred pounds transit charge on cotton from areas west of the Rio Grande River, which was temporarily stored or "transmitted" east of the Mississippi River, Stevens in the fall of 1967 had its California and Arizona cotton placed in the Houston Ship Channel Warehouse, where the transit charge did not apply. In place of the California and

Arizona cotton, Stevens had shipped to Gulfport the cotton from the Lower Gulf Region of Texas, which formerly had been sent to Black Hawk. The 8-cent charge was not applicable to this Texas cotton. According to Woodside, Stevens has placed some cotton in Gulfport every year since 1958. He testified further that he had assured the owners of Gulfport in the summer of 1967 that Stevens would place some cotton there that season, and that this is the reason the Lower Gulf Region cotton was diverted from Black Hawk to Gulfport.

Woodside's explanation that the 8-cent transit charge was responsible for the change in warehousing arrangements in 1967 does not withstand scrutiny. The 8-cent transit charge went into effect in September 1966. Notwithstanding this charge, in the months of November and December of 1966 alone, Stevens had 138 carloads of cotton shipped to Greenville from California, Arizona and those areas of New Mexico from which the transit charge was applicable. In my opinion, Woodside's explanation regarding the 8-cent transit fee is an afterthought and one which does not square with the facts. His further explanation that he had promised Gulfport some cotton in the summer of 1967 is likewise suspect, in my opinion. In view of the fact that in all of the 1966-1967 cotton season, Stevens had placed only five carloads of cotton in the Gulfport warehouse, and only 46 carloads in the 6 months before that, Stevens plainly was not obliged to place in Gulfport the very large quantity of cotton which it did—198 cars in the 2-month period from August 24 to October 24, 1968, inclusive.

The fact that it was more expensive for Stevens to place cotton in outside public warehouses than to handle it in Black Hawk, raises further doubts about Woodside's explanations for the diversion of this cotton from Black Hawk. Stevens had the Black Hawk warehouse constructed in 1960 for the purpose of having its own facilities for

concentrating cotton. Stevens had very substantial additions made to the warehouse as recently as 1964. Obviously these expenditures were made because Stevens believed this system preferable to reliance on outside public warehouses. Stevens' overhead expenses, the interest on its investment and the salaries of management and key personnel continue regardless of the extent to which Black Hawk's facilities are used. It is therefore definitely to Stevens' financial advantage to use Black Hawk's facilities when they are available in preference to outside public warehouses.

While the Respondent charges Stevens the standard public warehouse charges for receiving, handling, storing and shipping its cotton, $1.40 a bale plus 50 cents a bale a month for storage, since Black Hawk is a wholly owned subsidiary of Stevens, this money is in effect paid to itself. For Stevens to pay 40 to 50 cents a month per bale to outside warehouses for storing cotton when its has space available at Black Hawk appears to be a very unbusinesslike procedure since there is virtually no labor expense involved in the storage of cotton once it is in place in the warehouse.

There is no freight rate advantage to Stevens in using outside warehouses in preference to Black Hawk because of the transit privilege granted by the railroads which give Stevens the advantage of the through rate from the point of origin of the cotton to the consuming plant regardless of the length of stopover at the Black Hawk warehouse. In other words, as to all plants in the 201 freight rate group, which includes almost all of Stevens' cotton consuming plants, there is no freight charge for the outbound shipment from the Black Hawk warehouse to the consuming plant.

In contrast is the situation with cotton consolidated at Gulfport. The Louisville and Nashville Railroad charges Stevens a transit fee of 2½ cents a hundred pounds for the stopover privilege at Gulfport. This amounts to about

$14 a carload.[10] As stated above, no such charge is made for cotton "transitted" at Black Hawk. In addition, for cotton transitted at Gulfport and other outlying warehouses, Stevens has to pay for the shipment of the 2-pound samples of cotton to Greenville for classification.

While in the previous season approximately 30 percent of the cotton consumed by Stevens' plants was shipped direct from outlying warehouses, in the fall of 1967 Stevens greatly increased the flow of cotton direct to consuming plants from outlying warehouses. Although at first taking the position that there had been no substantial change in the volume of direct shipments from outlying warehouses in the 1967-1968 season, Controller Woodside ultimately admitted that 230,000 bales had been shipped direct in the first 10 months of the 1967-1968 cotton season, as compared with 120,000 bales for the full 1966-1967 cotton season. Thus the direct shipments were about doubled in 1967 as compared with 1966.

The records of Stevens' shipments to the Industrial plant in Rock Hill, South Carolina, which in recent seasons received the great bulk of its cotton from Black Hawk, illustrates the drastic change in Stevens' methods of supplying its plants with cotton occurring in the fall of 1967. In the first 6 months of the 1966-1967 cotton season, most of Industrial's requirements for cotton were met by shipments from Black Hawk, 160 carloads. In this period 18 carloads were shipped to Industrial from Commodity warehouse in Greenville, and only five carloads were sent from an outlying public warehouse, one in Ferriday, Louisiana. In the same period of the following cotton season 94 carloads were shipped to Industrial from Black Hawk, 19 carloads were sent from Commodity and the remaining 72 arrived

10. The Illinois Central Railroad, which Stevens also uses for shipments of cotton out of Gulfport, charges a transit fee of 2 cents per hundred pounds.

from outlying public warehouses. Stevens' shipments to Industrial from Black Hawk reached a low point in October and November 1967, when but seven cars in all were sent to the Industrial plant. In the preceding October and November, 69 cars were shipped from Black Hawk to Industrial and none were sent from outside warehouses.

The marked increase in the volume of direct shipments from outlying warehouses to consuming plants is the necessary concomitant of Stevens' greatly curtailed use of Black Hawk, for Stevens' plants regularly consume considerable quantities of cotton, their monthly consumption in the 1967-1968 cotton season averaging about 38,000 bales, or almost 350 carloads a month, and whatever shipments are not made by Black Hawk have to be made up from other locations.

5. Conclusions

To sum up, in September, October and November 1967, the Respondent terminated 20 employees (including one sample girl who had been on sick leave for some time), reducing its warehouse work force from 50, which was the number of employees on September 15, 1967, the date of the representation hearing, to 31, the number of warehouse employees on the date of the election. Thereafter the Respondent terminated three more warehouse employees, bringing the total number of warehouse employees down to 28. This was a reduction in force of unprecedented size. And just before the eligibility period for voting in the election expired the Respondent hired three new shop employees.

While the Respondent contends that this unusual reduction in force was due to lack of work, the record shows that after Stevens had become aware that a movement to organize the employees of the Black Hawk warehouse was under way, it commenced diverting large quantities of cotton

which it had previously had handled at Black Hawk to Gulfport. Thereafter, in September, Stevens substantially reduced the volume of cotton moving into the Black Hawk warehouse, consigning an exceptionally high percentage of cars to the Commodity warehouse, and actually placing an unusual number of cars at Commodity considering the low level of activity at Black Hawk. In the following months Stevens sharply reduced the volume of outgoing shipments from Black Hawk to its plants. The reduction in outbound shipments from Black Hawk was accompanied by a marked increase in direct shipments from outlying warehouses to Stevens' consuming plants, contrary to past practice. Stevens' various changes in its past practices regarding the warehousing of cotton and the supplying of its consuming plants were made without regard to the fact that it was more costly to Stevens to bypass its Black Hawk warehouse in this manner.

As above noted, the General Counsel contends that these changes were deliberately made by Stevens in order to give the Respondent an excuse for getting rid of a substantial number of union supporters among the warehouse crew before the election. The record shows that the Respondent was aware that the Union's strength lay among the Negro warehouse employees and that but one shop employee had attended union meetings. The fact that the Respondent hired three additional white shop employees at about the time the termination among the warehouse employees commenced and just before the eligibility period for voting in the election expired suggests that a desire to influence the outcome of the election was present in both the hirings and the terminations. It would seem that as activity lessened in the warehouse, the amount of work available would be reduced for shop employees as well as the warehouse employees, since the shop employees repaired the machines operated by the warehouse employees.

The Respondent's explanations for Stevens' decisions to divert cotton away from Black Hawk do not ring true, in my opinion. While I recognize that Stevens' extraordinarily large purchases of cotton in November and December 1966 temporarily caused a change in the pattern of operations at Black Hawk in the ensuing months, this change did not require the diversion in late August, September, and October 1967, of the large volume of cotton from the Lower Gulf Region of Texas into Gulfport at greater expense to Stevens. Had this cotton been sent to Black Hawk in the 1967-1968 season, as had been done previously, it would have done much to take up the slack at Black Hawk at the time of the layoffs.

Woodside's testimony that Stevens' desire to avoid the 8-cent transit fee caused the diversion of this early Texas cotton into the Gulfport in August, September and October 1967, cannot be relied upon, in view of the fact that in the previous cotton season very large quantities of cotton from areas subject to the same transit charge were sent direct to Black Hawk. In other respects I have found Woodside not a wholly reliable witness. In testifying concerning the comparative volume of direct shipments from outlying warehouses in the 1966-1967 and the 1967-1968 cotton seasons, Woodside first testified in effect that there was little change from one season to the next. Later on in his testimony, however, after finding out that the General Counsel had evidence of a substantial increase from one season to the next, Woodside admitted that the volume of direct shipments from outlying warehouses to consuming plants had almost doubled from one season to the next. In view of the foregoing and my observation of Woodside on the witness stand, I find I cannot accept Woodside's explanations for the very marked reduction in Stevens' use of the Black Hawk warehouse in September, October and November

1967, and its greatly increased use of Commodity and other public warehouses during this same period.[11]

The coincidence in timing between the change in Stevens' use of Black Hawk and its receiving knowledge of the union campaign, Stevens' simultaneous efforts to bolster the number of nonunion shop employees, when viewed in the light of Stevens' history of determined opposition to labor unions, lead me to the conclusion that the terminations here involved resulted from a preconceived plant to defeat the Union in the election. The Board's decisions in the prior Stevens cases document the continuing policy of Stevens' top management to frustrate the organization desires of Stevens' employees, wherever located.

Under all the circumstances I conclude, in accordance with the contention of the General Counsel, that Stevens deliberately changed past methods of doing business so as to be able to reduce the volume of cotton moving into Black Hawk and to have an excuse for laying off a substantial number of the group of employees which the Respondent had heard contained the largest number of union supporters, namely, the warehouse employees. The Respondent's implementation of Stevens' decision by terminating the 17 employees here involved in September, October and November 1967, therefore violated Section 8(a)(3) and (1) of the Act.

IV. The Representation Case

The Challenged Ballots

As stated above, the Board agent conducting the election at the Respondent's warehouse on October 25, 1967, challenged the ballots cast by 14 of the 17 employees here

11. Woodside was the only witness called by the Respondent to testify concerning Stevens' decisions regarding the purchasing and movement of cotton. Gordon McCabe, the president of the Respondent and the vice president of Stevens, and who has the ultimate responsibility for such matters, was not called to the stand.

involved (all except Harry Acker, Billy Jenkins and Walter Knox, who were discharged after the election), upon the grounds that they had been terminated by the Respondent prior to the election. Having found that all 17 employees here involved were discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, I find that they continued to retain their status as "employees" within the meaning of Section 2(3) of the Act, and therefore were entitled to vote in the election. Accordingly, I recommend that the challenges be overruled and that the Regional Director open and count the ballots of the 14 employees here involved, and that, if the Union received a majority of the valid votes cast, it be certified as the exclusive bargaining representative of the employees in the appropriate unit; but that if it be determined that the Union did not receive a majority of such votes, that the election of October 25, 1967, be set aside, and a new election conducted.

In view of my decision that the 14 employees here involved were discharged in violation of the Act, I need not reach the Union's alternative contention that the challenges to the ballots of the 14 employees should be overruled upon the ground that they were only temporarily laid off and had a reasonable expectation of being recalled in the near future and hence, were entitled to vote in the election regardless of the outcome of the unfair labor practice proceeding. However, in view of the fact that the Board may disagree with my conclusions in the unfair labor practice proceeding, I deem it advisable to consider this alternative contention.

While there is some testimony that employees were told when they were terminated that they would be recalled when work picked up, the preponderance of the evidence establishes that the Respondent does not make a practice of laying off and recalling employees. Rather the Respondent follows the procedure of terminating employees when

it finds a reduction in force necessary, and thereafter, if it rehires former employees, treats them as new employees. For these reasons, should it become necessary for me to consider the Union's alternative contention that the 14 employees were entitled, as temporarily laid off employees, to vote in the election, I would conclude that they are not entitled to vote in the election.

Conclusions of Law

1. By discharging Joyce Byrd, Agnes Foster, Thomas McMillian, Ollie McAllister, Alvin Kerns, James Smith, Bobby Bowen, James Jones, Sammy Patterson, James Brock, Donald Smith, Thomas Jenkins, Alvin Hunt, James Arnold, Harry Acker, Billy Jenkins and Walter Knox in September, October and November 1967, as part of a plan to effect the defeat of the Union in the election, the Respondent has discriminated with respect to their tenure of employment and has discouraged membership in the Union, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, my Recommended Order will provide that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent discharged 17 employees in violation of the Act. To remedy this unfair labor practice, my Recommended Order will provide that the Respondent offer each of these employees immediate

and full reinstatement to his former, or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of the discrimination to the date of the Respondent's offer of reinstatement, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Because of the character and scope of the unfair labor practices herein found, my Recommended Order will provide not only that the Respondent cease and desist from the specific unfair labor practices found, but also that it cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. However, in view of the fact that the record in this case contains no evidence of any other acts of interference, restraint, and coercion by the Respondent during the campaign to organize the employees at the warehouse, other than the discharges herein found, my Recommended Order will contain only the conventional remedial provisions ordinarily provided in discriminatory discharge cases, and will not contain the unusual provisions deemed necessary in the earlier Stevens cases.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

Recommended Order

The Respondent, The Black Hawk Corporation, Greenville, South Carolina, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Textile Workers Union of America, AFL-CIO, or any other labor organization, by discriminatorily discharging any employees or by discriminating in any other manner with respect to their hire and tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Joyce Byrd, Agens Foster, Thomas McMillian, Ollie McAllister, Alvin Kerns, James Smith, Bobby Bowen, James Jones, Sammy Patterson, James Brock, Donald Smith, Thomas Jenkins, Alvin Hunt, James Arnold, Harry Acker, Billy Jenkins and Walter Knox immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each whole for any loss of pay suffered by reason of his discharge, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary to analyze and compute the amount of backpay due under the terms of this Recommended Order.

(d) Post at its warehouse in Greenville, South Carolina, copies of the attached notice marked "Appendix A."[12] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 11, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[13]

Dated at Washington, D. C.

Owsley Vose
Trial Examiner

12. In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

13. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read, "Notify the Regional Director for Region 11, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX A

Notice

(See Opposite ☞)

APPENDIX A TRD-717-69

NOTICE TO EMPLOYEES

PURSUANT TO
A DECISION AND ORDER OF A TRIAL EXAMINER
OF THE NATIONAL LABOR RELATIONS BOARD

AFTER A TRIAL AT WHICH ALL SIDES HAD A CHANCE TO GIVE EVIDENCE, IT HAS BEEN DECIDED THAT WE, THE BLACK RIVER CORPORATION, VIOLATED THE NATIONAL LABOR RELATIONS ACT BY DISCHARGING CERTAIN EMPLOYEES IN AN EFFORT TO DEFEAT THE TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, IN AN ELECTION, AND WE HAVE BEEN ORDERED TO POST THIS NOTICE TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

The National Labor Relations Act gives all employees these rights:

To form, join, or help unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refuse to do any or all of these things

ACCORDINGLY, WE GIVE YOU THESE ASSURANCES:

WE WILL NOT do anything that interferes with these rights.

You are free to join the TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, or any other union, and, by majority choice, to select any union to represent you in bargaining with us.

WE WILL NOT discharge or fire you, or punish you or treat you differently in any way because you join or favor a union.

WE WILL give back to the discharged employees their jobs and seniority, and we will make up the pay they lost and also pay them 6 percent interest. The names of these employees are:

- - -

Joyce Byrd	James Brock
Agnes Foster	Donald Smith
Thomas McMillian	Thomas [illegible]
Ollie McAllister	Alvin Hunt
Alvin Reese	James Arnold
James Smith	Randy Acker
Lobby Bowen	Billy Jenkins
James Jones	Walter Knox
Sammy Patterson	

THE BLACK LUNG ASSOCIATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice may be addressed to the Board's Regional Office, 1924 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101 (Tel. No. 725-2911, Ext. 392).

APPENDIX B

Consignment and Placement

(See Opposite ☞)

APPENDIX B

CONSIGNMENT AND PLACEMENT OF CARLOADS OF COTTON IN BLACK RIVER AND COMMODITY WAREHOUSE 1/

MAY 1956 TO FEBRUARY 1968

	Jan.		Feb.		Mar.		Apr.		May		June		July		Aug.		Sept.		Oct.		Nov.		Dec.	
	BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH	Con BR	Con BH
1966									164	25	137	21	216	52	124	0	337	0	201	0	281	15(15)	435	47(10)
1967	62	15(13)	52	0	282	1	279	76(26)	93	61(66)	268	11(10)	190	13(13)	160	6(4)	58(37)	38(2)	31(1)	0	89	0	262	4
1968	14(2)	0	0	0	60																			

1/ The figures in parenthesis give the number of cars among the monthly totals which were originally consigned to the other warehouse and placed in the warehouse indicated upon arrival in Greenville. The figures are taken from Appendix B to the General Counsel's brief. I have checked the accuracy of these figures, and while I have found a few very minor errors, I have found none affecting the validity of the inferences to be drawn therefrom.

National Labor Relations Act

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one

year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enfore-

ing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 981

INDUSTRIAL UNION DEPARTMENT, AFL-CIO and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioners,

v.

THE BLACK HAWK CORPORATION

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

INDUSTRIAL UNION DEPARTMENT, AFL-CIO and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioners,

v.

THE BLACK HAWK CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Industrial Union Department, AFL-CIO and Textile Workers Union of America, AFL-CIO, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 18, 1970.

Opinions Below

The opinion of the Court of Appeals is reported at —— F.2d ——; 74 LRRM 2836 (CA-4, 1970) and is printed in the Appendix, p. 1a. The Decision and Order of the National Labor Relations Board is reported at 177 NLRB No. 120 (1969) and is printed in the Appendix, p. 13a. The Trial Examiner's decision is printed in the Appendix, p. 22a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 18, 1970, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1) and under Section 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C., Section 160(e), and (f).

Question Presented

1. Whether there was substantial evidence on the whole record to support the finding of the National Labor Relations Board that the Black Hawk Corporation had discriminatorily discharged 17 of its employees in violation of Section 8 (a)(3) and (1) of the National Labor Relations Act.

2. Whether the Court of Appeals for the Fourth Circuit properly applied the so-called "substantial evidence rule" in concluding that the National Labor Relations Board had "failed to carry its obligations of proving that Black Hawk was prompted by a discriminatory purpose in discharging the 17 employees."

Statute Involved

The questions discussed in this petition involve the application of the following sections of the National Labor Relations Act: Section 7, 29 U.S.C. Section 157; Section 8(a)(1), 26 U.S.C. Section 158 (a)(1); Section 8(a)(3), 29 U.S.C. Section 158(a)(3); Section 10(e), 29 U.S.C. Section 160(e); Section 10(f), 29 U.S.C. Section 160(f). They are printed in the Appendix, p. 58a.

Statement of the Case

A. The General Operation of the Black Hawk Warehouse

The Black Hawk Corporation (hereinafter referred to as "Black Hawk") is a wholly-owned subsidiary of J. P. Stevens & Company, Inc. (hereinafter referred to as the "Company"). The Black Hawk warehouse was constructed in Greenville, South Carolina in 1960 for the storage and handling of baled cotton which would eventually be used by the Company's twenty-one cotton consuming plants in North and South Carolina, Georgia and Tennessee. The cotton warehoused at Black Hawk comes from cotton-growing regions throughout the United States. While at Black Hawk the cotton is weighed and sampled for testing and classification by the Company's Commodity Division which is also located in Greenville, South Carolina. The Commodity Division has the responsibility for directing the movement of cotton into the Black Hawk warehouse and from there to the respective consuming plants.

The activities at the Black Hawk warehouse generally correspond with the various fluctuations occurring in any

particular cotton season. While the flow of outbound shipments of cotton from Black Hawk remains relatively constant throughout the year, the volume of inbound shipments to the warehouse varies with the seasonal fluctuations in the supply of cotton. As a rule, Black Hawk begins to get busy in August. Its operations gradually increase from that time on until they reach their peak between December and January. After January the activity begins to decline gradually until the slack period is reached sometime in the spring. This slack period usually runs from May until August, when the next season's cotton crop begins to arrive. In years prior to the season in question, 1967-1968, Black Hawk would start hiring additional employees as the cotton inflow began to pick up in late summer and early fall. As this inflow gradually subsided, and the spring slack period was reached, Black Hawk would begin to lay off employees. The employees in the appropriate unit are divided into two groups; a group of white shop employees, who service machines, and a group of Black employees, who work in the warehouse proper. During the 1965-1966 season the number of warehouse employees fluctuated from a high of 69 to a low of 40. In the 1966-1967 season employement of warehouse employees reached a high of 71 and a low of 45. This, then, for at least two seasons preceding the one in question, had been the normal pattern of business activity at the Black Hawk warehouse during an average twelve-month period, from August to August.

B. The Union's Campaign

In June of 1967, the Industrial Union Department, AFL-CIO (hereinafter referred to as the "IUD")[1] began an organizing campaign at the Black Hawk warehouse. The greatest response to that campaign was achieved among the all-Black warehouse employees, who included the 17 employees who are the subject of this petition. The Company became aware of the Union's organizing activities in August of 1967. Moreover, the Company was cognizant that, as a group, the warehouse employees had exhibited the greatest amount of interest in the organizational activities (A 27a-28a).[2] On August 22, 1967, the Union culminated its drive by filing an election petition (A 28a). At that date there was a total of 66 employees working at Black Hawk, 51 of them in the warehouse proper and 15 in the shop.

On September 15, 1967, a hearing on the Union's petition was held and thereafter, on September 26, 1967, a Decision and Direction of Election was issued by the Regional Director for the National Labor Relations Board providing for the election eligibility of all shop and warehouse employees on the payroll as of September 23, 1967 (A 28a).

On October 25, 1967 the election was held, resulting in 22 votes being cast for the Union, 24 votes against, with 17 challenged ballots (A 29a). These challenged ballots include 14 of the 17 employees here involved.

---

1. The IUD conducted the organizing campaign involved herein on behalf of the Textile Workers Union of America. The former filed the unfair labor practice charges under its own name and the election petition under the name of the Textile Workers Union of America.

2. "A" references are to the Appendix.

C. The Company's Response to the Union's Campaign

On September 21, three warehouse employees were laid off for lack of work. On September 22, three more were laid off; another was laid off on September 27; three more on September 29; two on October 6; two on October 13, and three on October 18. Therefore, by the time of the scheduled election on October 25, 1967, the strongly pro-union warehouse employee group had been reduced by 17 employees (A 28a-29a). Following the election an additional three employees from the warehouse group were also laid off for lack of work. In Black Hawk's past history, these layoffs had no parallel in either the number of people laid off or the short period of time during which the layoffs took place. Within one month of the representation election better than one-third of the warehouse employees had been laid off. All of this occurred at a time when Black Hawk's activities would normally be accelerating.

As compared with prior seasons, the cotton shipments by the Company to the Black Hawk warehouse during the months of September, October and November of 1967 were at an unparalleled low. During the fall of 1967, the Company shipped a total of only 174 carloads of cotton into the Black Hawk warehouse as compared with 819 carloads during the same period in 1966 (A 36a). Shipments of cotton from Black Hawk to the Company's consuming plants continued to be heavy until September of 1967, at which time the cotton stored at Black Hawk was depleted to between 35,000 and 40,000 bales, less than half of Black Hawk's 90,000 bale capacity. Following September, shipments to the consuming plants were also sharply reduced with only 114 carloads being shipped from Black Hawk during Oc-

tober and November of 1967, as compared with 600 carloads during the same period in 1966 (A 36a).

Notwithstanding the curtailment of activities at Black Hawk during the fall of 1967, the Company simultaneously increased its use of independently-owned warehouses for the storage and consolidation of its cotton. The following is an example: prior to the 1967-1968 season, if cotton consigned to the Black Hawk warehouse arrived in Greenville, South Carolina during a congested period when Black Hawk was not able to handle it; the shipments were diverted to the privately owned Commodity warehouses in Greenville or Paris, South Carolina. In contrast, during the fall of 1967 a very high percentage of the relatively few shipments into the Greenville area were consigned by waybill directly to the Commodity warehouse rather than at the Black Hawk warehouse (A 38a). Therefore, during a period when operations at the Black Hawk warehouse had come almost to a standstill, the Company found it more expedient to store some of its cotton at the Commodity warehouse which charged a $1.40 handling charge and a 50¢ per month storage charge for each bale of cotton stored there (A 44a).

During the critical months of 1967 the Company also altered its practice with regard to outbound shipments of cotton from the outlying independently-owned warehouses it utilizes. In the past, even when the Company found it necessary to store cotton in these outlying warehouses, it had been their practice to ship such cotton into the Black Hawk warehouse for classification before shipping it on to the consuming plant. For example, the rec-

ords of outbound shipments from the Federal Compress and Warehouse Company in Clarksdale, Mississippi, show that in the twenty-two month period ending with July 1967, 131 carloads of cotton were shipped from that warehouse to Black Hawk, while only one carload was sent directly from Clarksdale to one of the Company's consuming plants (A 40a). Shipments were made from the warehouse in Clarksdale to Black Hawk for nine consecutive months prior to August of 1967. In August, however, shortly after the Company learned of the Union's organizing campaign at Black Hawk, shipments from Clarksdale ceased completely for a three-month period. When the shipments resumed again, Black Hawk was quite regularly bypassed and most of the Clarksdale cotton went directly to the consuming plant (A 40a).

Another example of this change in past practice by the Company is provided by an examination of the records dealing with the Company's shipments of cotton to its Industrial plant in Rock Hill, South Carolina. These records indicate that during the six-month period which began in August of 1966, the Rock Hill plant received a total of 183 carloads of cotton, 160 of which had been shipped from the Black Hawk warehouse. Of the remaining 23 carloads, 18 had been shipped from the Commodity warehouse in Greenville, and only five carloads had been shipped directly to the Industrial plant from outlying independently-owned warehouses. In contrast, during the six months beginning in August of 1967 the Company began shipping an increasingly greater percentage of cotton directly from the place of origin to the Industrial plant rather than through the Black Hawk warehouse (A 45a-

46a). Overall, in the first ten months of the 1967-1968 season, the Company shipped about 230,000 bales of cotton directly from outlying warehouses to its consuming plants. This was approximately double the entire volume of such direct shipments in the preceding cotton season.

It is informative also to note that the Company was granted a "transit privilege" by the railroads whenever it had its cotton shipped from outlying warehouses through the Black Hawk warehouse and then on to the consuming plants. Under this transit privilege, an inbound shipment of cotton to any point within the so-called 201 freight rate group, a geographic zone including the Black Hawk warehouse and almost all of the Company's cotton consuming plants, could be sent first to Black Hawk and held there indefinitely, and then shipped on to a consuming plant with no extra charge for the stopover (A 44a). Therefore, the Company paid as freight only the through rate from the point of origin to the consuming plant, notwithstanding the period of time that the cotton remained at Black Hawk during its transit. Nevertheless, rather than utilize Black Hawk's extensive storage facilities, half of which were then empty and earning no income, the Company continued to ship cotton into privately owned outlying warehouses, thereby incurring unnecessary storage expenses which could have been avoided had the cotton been sent to the Black Hawk warehouse for storage.

D. The Board's Conclusion and Order

The Board, with slight modification, adopted the findings, conclusion and recommendations of the Trial Examiner who found that "Stevens deliberately changed past

methods of doing business so as to be able to reduce the volume of cotton moving into Black Hawk and to have an excuse for laying off a substantial number of the group of employees which Respondent had heard contained the largest number of union supporters, namely, the warehouse employees." (A 49a, 16a-17a). Determining that Black Hawk had violated Section 8(a)(3) and (1) of the Act the order directed they "cease and desist" from any further unfair labor practices and to offer reinstatement to the discharged employees (A 53a-54a, 17a).

The representation case having been consolidated with the complaint case, the Board overruled the objections to the 17 challenged ballots and directed that they be opened and counted (A 19a-20a). On November 5, 1969 the challenged ballots were opened and counted and showed 14 votes cast for the Union and three against, resulting in a revised total tally of 36 votes cast in favor of the Union and 27 votes against.

E. Decision of the Court of Appeals

A divided Court, agreeing with the Company's contention that the Board's decision lacked "substantial proof", refused to enforce that part of the Board's order as it relates to the 17 discharged employees (A 2a, 6a). As to the claim that the Company had unlawfully diverted shipments from Black Hawk, the Court stated:

> "We do not think that inferences of unfairly motivated or invidious employee-discrimination are permissible because of the change in shipping practices. Nor may such inferences be drawn in the instant situation from Stevens' history of union bias and knowledge of a current campaign (A 6a)."

Reasons for Granting the Writ

In *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951), this Court expressed the narrow confines of its review of Court of Appeals decisions in cases involving Labor Board matters:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

That the majority below did "grossly" misapply the substantial evidence rule, thereby warranting the issuance of a Writ of Certiorari by this Court, becomes apparent upon the examination of their mistaken reliance on questionable testimony and their failure to give proper allowance to obvious fact. The manner in which the majority misapplied the substantial evidence rule is best stated in the opening paragraph of the dissenting opinion by Judge Winter:

> "After reciting the established rule that the Board's choice between two fairly conflicting views may not be displaced, (citation omitted), and after concluding that the evidence prima facie supports the Board's conclusion that Black Hawk discriminatorily discharged 17 employees in violation of §§8(a)(3) and 8(a)(1), the majority, nevertheless, declines to enforce the Board's order in part (A 7a)."

The majority opinion reached the fateful conclusion by determining that the Board's findings, as to the discrimi-

natory manner in which the Company acted and the motive therefore, lacked substantial support. Their conclusion is best summed up as follows:

> "In sum, the Board has failed to carry its obligation of proving that Black Hawk was prompted by a discriminatory purpose in discharging 17 employees. Black Hawk's justifiable explanation for its conduct stands unrefuted, minifying the effect of the inferences the Board drew from its evidence on motive (A 6a)."

To state that Black Hawk's explanation of its conduct was "justifiable" and "unrefuted", thereby minifying the inferences of an anti-union motive on the part of this Company, ignores the obvious and challenges reality. In setting aside the Board's determination that the 17 employees had been unlawfully discriminated against in violation of Section 8(a)(3) of the Act, the Court of Appeals effectively erased their right to participate in the election and have their challenged ballots counted. By so holding, the Court set aside the Union's first election victory in the first case in which the Board did not have to set the election aside because of this Company's violations against the rights of its employees to freely and fairly choose a collective bargaining representative.

J. P. Stevens' record of unlawful conduct in regard to the rights of its workers to form a union defies one's imagination and is distinguished by its unbending and unceasing determination to destroy, at any cost, attempts at unionization by its employees. Witness the fact that since 1963-1964 J. P. Stevens Co., Inc. has been found guilty, by both the Board and the Courts in *10* separate cases, of voluminous unlawful acts, among them the discharge of *117* em-

ployees (excluding the 17 involved herein) because of their efforts to form a union.[3] In two prior proceedings, Stevens I and Stevens II, this Company was adjudged a law violator for illegally discharging employees at this very same Black Hawk warehouse. As recently as September 30, 1970, the Board found it necessary to seek a contempt citation against this Company for its failure to comply with a Court of Appeals decision and order.[4]

The majority agreed with the Company's contention that the decision to alter its past practice of operations at Black Hawk was motivated by legitimate business considerations. In this regard, the considerations advanced by the Company in justification of these changes have not been legitimate, cannot stand-up under close scrutiny and, moreover,

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3. Stevens I: J. P. Stevens & Co., Inc., v. N.L.R.B., 380 F.2d 292 (CA 2, 1967), cert. denied 389 U.S. 1005.

Stevens II: J. P. Stevens & Co., Inc., 163 N.L.R.B. 217 enf'd sub nom, Textile Workers Union of America v. N.L.R.B., 388 F.2d 896 (CA 2, 1967) cert. denied 393 U.S. 836.

Stevens III: J. P. Stevens & Co., Inc. v. N.L.R.B., 406 F.2d 1017 (CA 4, 1968).

Stevens IV: J. P. Stevens & Co., Inc. v. N.L.R.B., 406 F.2d 1017 (CA 4, 1968).

Stevens V: J. P. Stevens & Co., Inc. v. N.L.R.B., 417 F.2d 533 (CA 5, 1969).

Stevens VI: Black Hawk Corp. —— F.2d ——, (CA 4, 1970) the instant case.

Stevens VII: J. P. Stevens & Co., Inc. v. 179 NLRB No. 47 (1969) pending review before the Court of Appeals for the Fifth Circuit (Nos. 28,631 and 29,037).

Stevens VIII: J. P. Stevens & Co., Inc., 181 NLRB No. 97 (1969) pending review before the Court of Appeals for the Fourth Circuit (Nos. 14,450 and 14,530).

Stevens IX: J. P. Stevens & Co., Inc., 183 NLRB No. 5 (1970) pending review before the Court of Appeals for the Fourth Circuit (Nos. 14,739 and 14,842).

Stevens X: Black Hawk Corp., 183 NLRB No. 34 (1970).

4. N.L.R.B. v. J. P. Stevens & Co., Inc., before the Court of Appeals for the Fifth Circuit (No. 26,246).

as the dissent below points out, was actually more expensive for the Company. A storage fee of between 40¢ and 50¢ per bale per month is charged at any warehouse, including Black Hawk, but since Black Hawk is a wholly-owned subsidiary of the Company, the charge for cotton stored at Black Hawk is more illusory than real. To pay to store cotton in the independently owned warehouses for extended periods of time rather than storing it at Black Hawk at a time when space and manpower were available is economically implausible.

No more satisfactory is the Company's explanation for the switch to the practice of stripping cotton directly from outlying warehouses to consuming plants, by-passing Black Hawk. It was claimed that the Company could save the cost of loading, handling and reloading at Black Hawk—approximately $1.40 per bale—by shipping direct. The speciousness of this explanation was exposed by the dissent, which stated:

> "Even if the estimate of $1.40 per bale cost of handling at Black Hawk is accepted, the explanation overlooks the greater expense involved in storing cotton in independent warehouses for extended periods of time rather than at Black Hawk, a wholly-owned subsidiary, which was established and enlarged for this very purpose, and which had space, during the greater part of the period in question, to accommodate the cotton. Warehouse charges at an independent warehouse range from 40¢ to 50¢ per bale per month, and indirect expenses at Black Hawk continue whether it is used or not. Freight costs for shipping into Black Hawk and then to most of the manufacturing sites are no greater than direct shipments to plants from independent warehouses" (A 10a).

In discussing the Company's decision to by-pass the Black Hawk warehouse in shipping cotton to its consuming plants, the majority decision concluded that "Whether or not the rearrangement was warranted was a matter of the internal economy of the business, to be resolved by the Company," citing with approval *J. A. Hackney & Sons, Inc. v. N.L.R.B.*, 426 F.2d 943 (CA-4, 1970). The petitioner denies that there is any parallel between the factual situations of the *Hackney* case and the instant case. In *Hackney*, where the Company was charged with having discriminatorily discharged forty-one employees, the Company also raised the defense that the discharges were motivated by economic considerations. But unlike the instant case, the company there came forward with a persuasive set of circumstances to sustain their defense. In that case, the company produced evidence that, after enjoying several prosperous years, the entire glass industry, including itself, was adversely affected by a major strike in 1968. As a consequence of this labor dispute the company suffered a serious business decline which eventually necessitated the curtailment of its operations. The Court there concluded: "Against the overwhelming evidence of an economic motivation for the discharges, as well as the non-discriminatory manner in which they were effectuated, the inferences which the Board drew from the 8(a)(1) activities * * * cannot stand."

The Company's defense of economic justification in the instant case was clearly far from overwhelming. Thomas Woodside, the only witness called by the Company to testify concerning its decisions regarding the purchasing and movement of cotton (A 49a, footnote 11) and upon whose

testimony the majority relies for its finding, was found by the Trial Examiner who observed his demeanor and manner while testifying, to be "*not a wholly reliable witness*" (A 48a) (emphasis ours). In discussing Woodside's testimony, Judge Winter, in his dissent, perceptively noted:

> "Initially, Controller Woodside testified that there was no appreciable increase in direct shipments to the plants in the period beginning in August 1967; *but when general counsel proved otherwise, Woodside changed his testimony* and admitted that in the first ten months of 1967–1968 season, Stevens nearly doubled the volume of its direct shipments, as compared with the entire preceding season" (A 10a) (emphasis ours).

That the majority below bases its opinion upon the testimony of such a questionable witness, substituting its judgment for that of the Trial Examiner and the Board as to the veracity of his explanations and statements, heightens the gross distortion and misapplication of this Court's "substantial evidence" rule laid down in *Universal Camera supra* and *N.L.R.B.* v. *Walto Mfg. Co.*, 369 U.S. 404.

Perhaps even more distressing is that the majority below relied upon the statement of a questionable witness employed by a Company which has been found to deliberately require its managerial personnel to lie on the witness stand. Witness the following observations made by the late Trial Examiner, Boyd Leedom, in his decision against this Company in J. P. Stevens & Co., Inc., 167 NLRB 266, 273-274:

> "As will appear, where there has been a direct conflict in testimony of witnesses called by the Respondent and those put on the stand by the General

Counsel. I have in the main credited the testimony adduced by the General Counsel.

* * * These views on credibility resolution are set forth in part because many of the findings hereafter made reject the testimony of numerous witnesses who hold positions in middle and lower management echelons of the Respondent Employer. I am charged with and do take notice of the previous cases which legally establish at this point that Respondent and the persons who share in the responsibility of forming its policy in dealing with the Union here involved are predisposed to defeat the Union and the employees in their right to act in concert respecting wages, hours, and working conditions, even though such opposition involves violating the Labor Management Relations Act.

* * * Such witnesses, who took an oath to tell the truth, offered evidence not accepted here, which if colored or untrue, nevertheless was offered seemingly without compunction.

* * * I have the inescapable but independently reached conviction, erroneous as it may be, from having heard innumerable witnesses at the trial and having carefully digested and reviewed their testimony from the typewritten transcript, that many of the witnesses called by Respondent testified as they did pursuant to a policy, made at a higher level of management than theirs, to defeat this Union's organizational effort at the cost, if necessary, of committing unfair labor practices and then denying the unlawful acts in the process.

* * * and that is what I here seek to do, greatly deploring what seemed to me to be a flagrant breach by many of the promises made under oath to tell the truth.

* * * And underlying the discussion is a faint hope that something here written might tend to produce a new appraisal in some quarters of the methods used

> in opposing employees' rights to organize. For if, as I believe and find, there has been a deliberate intention on the part of some to bring about a result in this case not based on truth, such persons will not only add substantially to the measure of human misery if they succeed, but more importantly, perhaps, they have added their very considerable weight to the persistent and pervasive disregard of the rule of law, that now afflicts our society."

It is obvious from the numerous violations committed by this Company after these words were penned by Boyd Leedom that his plea for "a new appraisal in some quarters of the methods used in opposing employees' rights to organize" fell upon deaf ears and blind eyes insofar as J. P. Stevens & Co., Inc. is concerned.

By its own test[5] the findings of the Court below must fail for the inference drawn by the Board were not "so overborne" by evidence calling for a contrary conclusion. At best, the facts give rise to more than one view. Where there is a difference between the Board's view and the Court's, the Court may not substitute its view nor "displace the Board's choice" between the two views where the Board's decision is supported by substantial evidence. *Universal Camera, supra.* This is true even where the Court could have justifiably drawn a different conclusion had it heard the case *de novo.* In accordance with the scope of review delineated by *Universal Camera* and reiterated

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5. A 5a "In this the test is whether

> 'the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not * * * be deemed to be supported by 'substantial evidence.' N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951)."

by the Court in *Walton*, such finding, when as here supported by substantial evidence, should not have been disturbed on review.

Conclusion

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: November 16, 1970

Addendum

Due to the length of the lower court opinions, the Appendix, consisting of the Court of Appeals' Decision (A 1a), the Board's Decision and Order (A 13a), the Trial Examiner's Decision (A 22a), and the Statutes involved (A 58a), has been reproduced in a separate volume.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 981

INDUSTRIAL UNION DEPARTMENT, AFL–CIO AND TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONERS

v.

THE BLACK HAWK CORPORATION AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The judgment of the court of appeals (Pet. 2) was entered on August 18, 1970. The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on November 16, 1970, and no extension of time was granted. The petition was filed on November 17, 1970. Since the 90-day time

limitation is jurisdictional, the petition is untimely and should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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vs.

THE BLACK HAWK CORPORATION

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE BLACK HAWK CORPORATION IN OPPOSITION TO PETITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

The National Labor Relations Board Does Not Ask For Certiorari, And The Petitioners, As Limited Intervenors, Have Very Doubtful Standing To Do So

It is first and importantly to be noted that the National Labor Relations Board, which rendered the Decision and Order that were the subject of contro-

versy in the Court of Appeals, has not asked this Court to review this case.

Instead, the only Petitioners before this Court were intervenors—and belated intervenors—in the Court below. Moreover, the nature and scope of their intervention in the Court of Appeals was strictly limited.

The Industrial Union Department, AFL-CIO and Textile Workers Union of America, AFL-CIO, now Petitioners, took no part in the trial of this complaint case against The Black Hawk Corporation at the hearing before the Labor Board's Trial Examiner. After the Trial Examiner rendered his Decision, they filed exception only as to matters of remedy.

Upon the rendering of the Board's Decision and Order, the Company petitioned the United States Court of Appeals for review. The Board promptly appeared in opposition and asked for enforcement of its Decision and Order.

The Unions came in tardily and filed a "Motion For Leave To File Out Of Time A Motion For Leave To Intervene". The Court allowed the Unions to intervene, but only with respect to the subject of remedy, not for the purpose of making any contest on the merits of the case.[1]

Yet the Unions, by their Petition to this Court, now become the sole means through which this Court is asked to review the merits of the case.

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[1]The Unions' Motion and the Court's ruling thereon are hereinafter set forth as an Appendix to this Brief.

It Is Not The Practice Of This Court To Review Questions Of Fact Such As The Petitioners Now Seek To Present

As the Petition for Certiorari shows upon its face, this is a case in which this Court is being asked to review evidence and credibility of witnesses and the factual inferences to be drawn from the evidence and the testimony.

More specifically, The Black Hawk Corporation operates a cotton storage warehouse in Greenville, South Carolina, and the inquiry which the Petitioners desire this Court to undertake is whether there were, in the year 1967, such variances from the Company's normal operating procedures as to support an inference that the Company shaped the flow of cotton to and from that warehouse in that year for the purpose of curtailing its operations more than usual and at a different time than usual"—or whether such an inference is not sustained in view of the Company's business and operational explanations of the variances which occurred.

It is submitted that the authorities, and the rulings of this Court governing the granting of certiorari, all declare that this Court does not sit in review upon such questions.

"Whether on the record as a whole there is substantial evidence to support agency findings is a

question which Congress has placed in the keeping of the Courts of Appeals".

Universal Camera Corporation vs. National Labor Relations Board, 340 US 474, 491, 71 S Ct 456, 95 L Ed 456, 469

"Last term we made it plain that Congress charged the Courts of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way'. *National Labor Relations Board v. Pittsburgh S.S. Co.* 340 US 498, 503, 95 L ed 479, 482, 71 S Ct 453 (1951). We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case".

National Labor Relations Board vs. American National Insurance Company, 343 US 395, 409-410, 72 S Ct 824, 96 L Ed 1027, 1040

National Labor Relations Board vs. Pittsburgh Steamship Company, like the case the Petitioners now seek to present, was a case in which the Court of Appeals had "concluded that the inferences on which

the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence". There this Court said:

"Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . .' Taft-Hartley Act § 10(e), 61 Stat 148, ch 120, 29 USC (Supp III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal'. *Layne & Bowler Corp. v. Western Well Works*, 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assess-

ment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated.

"In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations'. *Federal Trade Com. v. American Tobacco Co.*, 274 US 543, 544, 71 L ed 1193, 1194, 47 S Ct 663."

National Labor Relations Board vs. Pittsburgh Steamship Company, 340 US 498, 502-503, 71 S Ct 453, 95 L Ed 479, 482-483

"We do not grant a certiorari to review evidence and discuss specific facts".

United States of America vs. Johnston, 268 US 220, 227, 45 S Ct 496, 69 L Ed 925, 926

"There is nothing in the lower courts' decision on either of the added questions to warrant review here . . . Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it". *General Talking Pictures Corporation vs. Western Electric Company*, 304 US 175, 178, 58 S Ct 849, 82 L Ed 1273, 1275

See also Rule 19 1(b) of the Rules of this Court, outlining the "Considerations Governing Review on Certiorari".

The petitioning Unions seem to consider that this Court should review this case because various other litigations which J. P. Stevens & Co., Inc. has had under the National Labor Relations Act have been decided adversely to the Company. It is submitted, however, that the history of those cases argues against the granting of the present Petition for Certiorari, not for it.

For example, in what the Petitioners refer to as Stevens I, *J. P. Stevens & Co., Inc., vs. National Labor Relations Board*, 360 F 2d 292 (2nd Cir., 1967), the Labor Board heard four hundred and forty-three witnesses testify on a multitude of disputed and material factual issues. Most of these witnesses testified for the Company. They included not only supervisors and representatives of management, but rank and file employees and persons unconnected with the Company as well. Yet upon every disputed and material issue of fact, the Board never once found any witness

for the Company to be telling the truth nor any witness for the Union or the Board to be telling anything but the truth! The Company believing that to be a case of obviously one-sided "fact finding" on a major scale, sought review in this Court. Yet this Court declined to grant certiorari.

The Argument Presented In The Petition Is Not Supported By The Record

The present case related entirely to the termination of the employment of seventeen individuals during the course of a curtailment of operations by The Black Hawk Corporation in September, October and November of 1967.

As has been noted above, the Company operates a warehouse for the storage of cotton. It was undisputed that this business is seasonal and that in each and every year of its operations, the Company has reduced the number of its warehouse employees during its slack season (27-28, 115[1]).

It was further undisputed that in each and every year, such reductions in work force have been accomplished by terminations, not temporary lay-offs, and in strict accordance with seniority (49, 115-116). Still further, it was undisputed that such was exactly the

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[1]Unless otherwise indicated, all page references are to the printed Appendix filed with the United States Court of Appeals for the Fourth Circuit.

procedure followed with respect to the individuals involved in the present case (22, 49, 116, 118[1]).

In two respects only did the Board find fault with the work force reduction in 1967, namely, that it was larger than usual and that it came later in the year than usual. The Board's whole claim was that because of these two elements, it was clear that the individuals in question were terminated "in order to affect" the outcome of an election at the Company's warehouse (4).

In all the years of the Company's operations, the annual reductions in the number of warehouse employees, from high point to low point, were as follows (155):

In 1961, from 38 to 22 — that is, 16.

In 1962, from 44 to 29 — that is, 15.

In 1963, from 45 to 24 — that is, 21.

In 1964, from 47 to 27 — that is, 20.

In 1965, from 69 to 40 — that is, 29.

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[1]There were three women as to whom this did not apply. With regard to them, the uncontradicted evidence was that they were temporary samplers of "loose" cotton; that they were "the only women working in the warehouse"; that this was the first and only year that women were thus employed "in the warehouse"; and that "they were hired with the understanding" that their work "was temporary" and that "they would be cut off" as soon as the loose sampling work, which they were doing, was completed (117-118).

In 1966, from 71 to 45 — that is, 26.

In 1967, from 61 to 31 — that is, 30[1].

It is thus immediately to be seen that the work force reduction in 1967, was not of such magnitude, by comparison to other years, as to constitute proof of anything against the Company[2].

It is further to be noted not only that in making the terminations here at issue the Company strictly followed seniority, but that there is no evidence that the Company had any knowledge or inkling as to which individuals among its employees were "for" the Union and which of them were "against" it (Tr. 158).

The Board's Trial Examiner pointed out that in its mechanical shop adjacent to the warehouse, the Company did not reduce the work force but instead increased it by three during September and October of 1967. As to this, however, there was no evidence whatever that the work of the shop was of a seasonable nature, or that it was in any way confined to the

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[1]After the election this figure of 31 dropped to 28. Since, however, the claim against the Company is that the terminations in question were made "in order to affect the results of the election", the pertinent figure would seem to be the number to which the employees had been reduced at the time of the election, namely, 31. Indeed, the fact that terminations occurred after the election would seem to be in itself a circumstance indicating that terminations were not being made for the purpose of influencing the election.

[2]It is further to be noted that the 17 terminations which the Board complained of were by no means all of the terminations occurring in 1967.

repair or maintenance of the machines in the warehouse, or that reduction in the work force of the shop should have followed, or ever did follow, reduction in the work force of the warehouse.

As to the claim that the Company wrongfully caused its work force reduction in 1967 to occur at a time which would "affect the results of the election" (4) held on October 25, of that year, the pertinent evidence was as follows.

A "cotton season" is defined in the trade as running from August 1 to August 1, since the "first cotton" from any new crop becomes "available" in the month of August (133).

During the latter part of the year 1966, the cotton-buying officials of J. P. Stevens & Co., Inc., anticipated —and as it turned out correctly anticipated—that the price of cotton was going to be much higher in the following season, that is, the 1967-1968 season (78). The Company therefore in November and December of 1966 and January of 1967, bought an "unusual" amount of cotton, "approximately 650,000 bales", more than it had ever purchased before in any season and more than twice the amount it purchased in the following season (78-79, 134-138).

Approximately half of Stevens purchases of cotton each year move to the Black Hawk warehouse and from there to the Stevens manufacturing plants (125). Approximately half remains in warehouses, principally along the Mississippi River where it was

purchased, and is shipped from such warehouses direct to the Stevens plants (128-129, 130-132).

The results of the extraordinarily heavy buying[1] of cotton by Stevens in November and December of 1966 and January of 1967, were, first, that the Black Hawk warehouse, which normally has its slack season from about May through August, was kept busy throughout this period in 1967, and well into August of that year (140-141). Therefore, the labor reductions here in question did not take place as usual during that period of time.

A further result of the heavy purchases described above was that when activity at the Black Hawk warehouse began to slacken after August in 1967, it was not picked up as usual by incoming movement of the new cotton crop, for the simple reason that Stevens, having its heavy purchases in hand, was buying very little of the new crop—which was turning out to be not only the shortest crop since the year 1895, and of "extremely high" price, but was of "very poor quality" and very "late" (77-79, 141-143).

A still further consequence that Stevens' large and fortunate purchases of cotton in November and December of 1966 and January of 1967, was explained as follows. A principal purpose of a large cotton warehouse is not only the storing and protecting of the cotton, but also the gathering of the hundreds and thousands of bales of many different types and grades

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[1]The Board conceded that it was such (5).

and staples, from many different sources, so that a number of bales of the same type or grade or staple can be sorted out and put together and thereby make possible a uniform shipment of substantial size to a plant using that type or grade or staple (125-132, 144-145, 148-149, Tr. 505, Tr. 509-510).

In 1967, as a result of its very large purchases, Stevens had on hand an unusual amount of cotton from which to sort out uniform aggregations of bales in the principal areas of purchase, that is, in the warehouses of the Mississippi River region (128-132). This was, therefore, done there, in those so-called western warehouses, in larger measure than ever before. And when the Black Hawk warehouse had largely finished all other gathering and sorting and shipping in the late Summer of 1967, these western warehouses began to ship directly to the plants more than they ever had before[1] (137-144, 148-149, Tr. 505).

This avoided the expense and trouble of such cotton being shipped to the Black Hawk warehouse and unloaded and stored there and then being loaded and shipped again, in order to reach the manufacturing plants[2]. But such direct shipments from the western warehouses to the manufacturing plants obviously did not contribute toward increasing activity at the Black Hawk warehouse.

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[1]The grading and classifying for such direct shipments having already been done during the earlier months of 1967.

[2]In addition to storage charge, the Black Hawk warehouse charged $1.40 per bale for loading and unloading.

To all of this explanation, the Board made only one reply—that if Stevens had followed past practice, it would have shipped more cotton from the western warehouses to Black Hawk in the Fall of 1967, than it did, and that would have helped to keep Black Hawk busy (7). But nowhere did the Board or its Examiner face up to the Company's clear answer to this, as explained above, namely, that because of its exceptional wide and heavy purchases in November and December of 1966 and January of 1967, the Company was able to accomplish more direct shipping to manufacturing plants from western warehouses than ever before—by reason of larger quantities in those warehouses from which to sort out uniform blocks for direct shipment.

In other words, Stevens was able in greater degree than ever before to accomplish in the western warehouses what it would otherwise have to ship from them to Black Hawk in order to accomplish, namely, the bringing together of large quantities of bales of cotton so that sorting into uniform blocks or aggregation could be done. And thereby, at the very least, Stevens saved $140.00 per freight carload[1], which on hundreds and hundreds of carloads is hardly to be disregarded (128-131).

The Board and its Examiner declared that such direct shipments resulted in "considerable cost" to

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[1]As pointed out above, Black Hawk's charge for unloading, handling and reloading was $1.40 per bale, and there are approximately 100 bales to a carload (126).

Stevens (6). In explanation of this, the Examiner pointed out that on "some" of such direct shipments there would be a railway transit charge of about $14.00 per carload, and was the cost of sending "two pound samples" to Greenville, S. C. for "classification" (42).

It is submitted that this was indeed "straining at a gnat and swallowing a camel". How is it that the Board and the Examiner had acuté vision for such minutiae as this, but could not see the circuitous and broken route of shipment and re-shipment via Black Hawk and the $140.00 charge per car for unloading, handling and reloading at Black Hawk.

But, said the Examiner, "since Black Hawk is a wholly owned subsidiary of Stevens"—this is money, "in effect paid to itself" (41). This is amazing reasoning. Is it not obvious that Stevens, or more precisely, its subsidiary, Black Hawk, has to pay employees to unload and handle and reload these carloads of cotton, and that by short-circuiting such unloading and handling and reloading process, through direct shipments to plants, Stevens can save such costs? Apparently the Board would have had the Company retain these employees solely for the sake of paying wages to them.

There was another very significant aspect to the Board's criticism of Stevens' increased shipments to plants direct rather than through Black Hawk. Upon all the evidence before him, the Board's Examiner found himself able to complain of such shipments

from only two western warehouses, namely, the warehouse at Gulfport, Mississippi, and the warehouse at Clarksdale, Mississippi (36).

With regard to the first of these, the Examiner devoted elaborate discussion, not actually to increased shipments from this warehouse direct to manufacturing plants in the Fall of 1967, but rather to increase in the quantity of cotton placed in this warehouse in the Fall of 1967 (36-40). The Board definitely stated, however, that "it was not the placing of the cotton in" such warehouse that it "find[s] significant" (6). The Board said that it placed significance only in the increase of shipping from such warehouse "directly" to manufacturing plants instead of "through Black Hawk"—Black Hawk thus receiving less business from such warehouse than it had before.

A tabulation introduced into evidence by the Board's General Counsel showed that during the months of September, October, November and December of 1966, there were 21 carloads of cotton shipped from this warehouse direct to Stevens' manufacturing plants, and that during the same months of 1967, there were 60 such cars of such direct shipments from this warehouse. The difference of 39 cars would have provided total unloading, handling and reloading employment for seventeen employees at the Black Hawk warehouse amounting to less than five days.

As to the Clarksdale warehouse, the same comparison showed a difference of 29 carloads—again a quantity of cotton which, had it been shipped to Black

Hawk instead of going direct to manufacturing plants, would have furnished employment for seventeen warehouse laborers, of substantially less than four days.

Thus the Board showed approximately eight days employment which it said the individuals in question could have had except for Stevens' shipping more cotton than usual from western warehouses, direct to manufacturing plants in the Fall of 1967.

The Board's Examiner also strained zealously to find that in the Fall of 1967, "Stevens commenced consigning the great bulk of its shipments from outlying areas to the commodity warehouse in Greenville, a public warehouse having no connection with Black Hawk or Stevens" (33). But the Board declined to follow its Examiner on this expedition, saying that it did not see any reason to declare that the Company made any "unusual use of commodity in 1967" (5). Yet the Unions, in their Petition to this Court (p.7) now rely upon a contention with respect to shipments to the public commodity warehouse in Greenville, which neither the Court of Appeals nor the Board itself would accept[1].

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[1]At the conclusion of the testimony of the Company's witnesses, the Company not only presented tabulations as requested by the Trial Examiner, relative to Stevens' inventories, acquisitions, and consumption of cotton for three years by months, but also offered to present "the original records" on "any of the figures" referred to in the Company's testimony (153).

The sum and substance of the whole matter is that each and every year, at the Black Hawk warehouse, a reduction of the work force takes place. That it occurred as it did and when it did in 1967, resulted naturally and reasonably from decisions made and actions taken in the latter part of 1966 and early 1967—all at a time long before anyone claimed there was any Union campaign in existence[1].

From those decisions and actions, relative to the largest purchases of cotton in the Company's history, it logically followed:—that the Black Hawk warehouse would be busy, into and through the Summer of 1967, longer than usual, and that its slack period would therefore be later than usual—that when such late slack period did begin in September of 1967, it was not relieved by the usual purchases and movements of new crop cotton, because Stevens having on hand an abnormal supply of cotton was purchasing very little of the new crop—that Black Hawk's late slack period in the Fall of 1967, was moreover unrelieved because Stevens, having unusually large quantities of cotton in western warehouses from which to sort, was able to make more direct shipments than usual from these warehouses to the manufacturing plants.

The idea, for which the Unions are contending, that the decisions and actions governing these mat-

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[1]The Trial Examiner found that the Union "began" its "organizing campaign among the employees at the Black Hawk warehouse in the latter part of June, 1967" (20-21).

ters, involving many millions of dollars and determined many months before the Union's campaign was ever heard of, were in fact and truth, shaped so as to affect the outcome of the October 25 election at the Black Hawk warehouse—is nothing short of preposterous.

The "proof" against the Company deserved no such label at all. It was the merest aggregation of wisps and straws, convincing of nothing. And the Board's "finding" against the Company was nothing other than speculation, surmise and conjecture.

The Court of Appeals rightly determined that the ruling of the Board was not supported "on the record considered as a whole".

CONCLUSION

Upon all of the foregoing, The Black Hawk Corporation earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for The Black Hawk Corporation

United States Court of Appeals
FOR THE FOURTH CIRCUIT

THE BLACK HAWK CORPORATION,
Petitioner,

v.

NATIONAL LABOR
RELATIONS BOARD,
Respondent.

No. 13,746

MOTION FOR LEAVE TO FILE OUT OF TIME A MOTION FOR LEAVE TO INTERVENE

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

The Industrial Union Department, AFL-CIO, and the Textile Workers Union of America, AFL-CIO, together move this Court for permission to file out of time a motion for leave to intervene in the above case.

In support of their joint motion, the Movants show that the Petitioner filed its petition for review in this Court on July 24, 1969. Due to certain staff changeovers, in particular the resignation of the attorney who represented both the Industrial Union Department and the Textile Workers Union of America in the Board proceedings below, the Movants did not file a motion for leave to intervene within the period prescribed by Rule 15(d) of the Federal Rules of Appellate Procedure.

WHEREFORE, the Industrial Union Department, AFL-CIO, and the Textile Workers Union of America,

AFL-CIO, pray that their motion be granted and that it be allowed to file and serve out of time, a motion for leave to intervene.

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Textile Workers Union of America, AFL-CIO,
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New York, N. Y. 10003

Dated: New York, N. Y.
this 8th day of September, 1969.

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 13,746

THE BLACK HAWK CORPORATION,
Petitioner,

vs.

NATIONAL LABOR
RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board

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Upon consideration of the motion for leave to file out of time a motion to intervene, the motion to intervene and response to the motions,

Leave is granted the Industrial Union Department, AFL-CIO and the Textile Workers Union of America, AFL-CIO, to intervene, such intervention to be limited to the exceptions taken in the proceedings before the National Labor Relations Board, pursuant to Rule

15(d) of the Federal Rules of Appellate Procedure and Local Rule 5(a).

FILED
SEP 18 1969
SAMUEL W. PHILLIPS
Clerk

For the Court—by direction.

s/ Samuel W. Phillips

Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By Margaret W. Walton

Deputy Clerk

SUPREME COURT, U. S.
FILED
DEC 21 1970
CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 981

INDUSTRIAL UNION DEPARTMENT, AFL-CIO, and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioners,

v.

THE BLACK HAWK CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

REPLY BRIEF FOR INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, TO THE MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1970

No. 961

INDUSTRIAL UNION DEPARTMENT, AFL-CIO, and
TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioners,

v.

THE BLACK HAWK CORPORATION and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

REPLY BRIEF FOR INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, TO THE MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent NLRB opposes Textile Workers Petition on the ground it was not timely filed. It is true, as the NLRB points out, that the 90-day period for applying for a Writ of Certiorari prescribed by 28 U.S.C. 2101(c) expired on November 16, 1970, and that no extension of time was granted. Petitioner was well aware of this expiration date, and with due regard for it mailed its Petitions to the Court five days prior to the expiration date, on the morning

of November 12th, with copies to the NLRB, the United States Court of Appeals for the Fourth Circuit, the Solicitor General, and to Blakeney & Alexander, attorneys for Respondent Black Hawk Corporation of J. P. Stevens and Company, Inc. Actually, on November 12th, Textile Workers Union of America made two mailings to the Court: (1) by certified mail, return receipt requested, a covering letter with an Affidavit of Service and the $100.00 check, and (2) by regular first class mail, the 40 copies of the Petition. Of these six mailings (the two to the Court and the four to the parties listed above), five arrived without problem. The Solicitor General's mimeographed receipt reflects the fact that his copy of the Petition arrived November 13th. The certified mail receipts indicate that the other three of the four listed copies arrived at about the same time. The Office of the Clerk of the Court has informed us that the Court received our letter, which had been mailed simultaneously with our Petitions, on November 13th.

Thus, it is clear that the mailing date was reasonably chosen to get the Petitions to the Court in [illegible]ple time.

The Post Office, however, chose to sit on the Petitions themselves. The Petitions did not arrive at the Court until November 17th.

There is no question but that 28 U.S.C. 2101(c) provides that a Writ of Certiorari must "be applied for" within ninety days after the entry of judgment or decree. Textile Workers did apply for a Writ of Certiorari—with all due diligence—within ninety days. The NLRB nevertheless asserts that our application was not timely.

It would certainly be true that if Respondent NLRB had waylaid Petitioner Textile Workers' messenger to the Post Office, so that the Petition was prevented from reaching the Court because of the Government's waylaying, it would not be held that we had failed to apply timely.

Here it was not the NLRB, but a sister branch of the Government, namely the United States Post Office, which waylaid the mail. The Government should not be permitted to profit from its own negligence.

Respondent J. P. Stevens has been found to have violated the National Labor Relations Act in a gravely serious continuing pattern in five decisions of three United States Courts of Appeals, and in addition in five decisions of the National Labor Relations Board besides the one here in question. Respondent Stevens has been found to have discharged 117 employees because of their exercise of the rights under the National Labor Relations Act. The decision below in the instant case is a mutation within this pattern, rewarding recidivism. The decision should be reviewed by the United States Supreme Court, if the National Labor Relations Act is a statute to be enforced, rather than a Volstead Act, the violation of which is to be publicly accepted.

If Petitioner had been in any way at fault in the failure of the petitions to reach the Court November 16th, it might conceivably make sense to hold that we had not, within the meaning of Section 2101(c), "applied for" certiorari within 90 days. But it is the Government, and only the Government, which was at fault. They should not now be heard

to claim that their delay can deny Petitioners the opportunity to seek certiorari.

Respectfully submitted,

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Dated: New York, N.Y.
December 18, 1970